(23,975)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 317.

THE NATIONAL BANK OF ATHENS, APPELLANT,

vs.

F. C. SHACKELFORD, TRUSTEE IN BANKRUPTCY FOR J. N. WEBB.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 24, 1914.

a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the First Monday in October, A. D. 1913, at Atlanta, Georgia, Before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable Rufus E. Foster, District Judge:

NATIONAL BANK OF ATHENS, Appellant,
versus
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb, Appellee.

Be it remembered, that heretofore, to-wit, on the 18th day of August, A. D. 1913, a transcript of the record of the above styled cause, pursuant to an appeal from the District Court of the United States for the Northern District of Georgia, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2548, as follows:

b TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2548.

NATIONAL BANK OF ATHENS, Appellant,
versus
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb, Appellee.

Appeal from the District Court of the United States for the Northern District of Georgia.

[Original Record Filed August 18, 1913.]
U. S. Circuit Court of Appeals. Filed Aug. 29, 1913. Frank H. Mortimer, Clerk.

1 *Transcript of Record.*

In the United States Circuit Court of Appeals for the Fifth Circuit.

In the Matter of J. N. WEBB, Bankrupt.

In Bankruptcy.

NATIONAL BANK OF ATHENS, Plaintiff in Error and Appellant,
versus
F. C. SHACKELFORD, Trustee for J. N. Webb, Defendant in Error and Appellee.

In Equity.

Jno. J. and Roy Strickland, Attorneys for Appellant, Athens, Ga.
H. M. Holden, S. C. Upson and Cobb & Erwin, Attorneys for Appellee, Atlanta, Ga.

2 (*Original Equitable Petition.*)

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

In the Matter of J. N. WEBB, Bankrupt.

In Bankruptcy. No. 318.

To the Honorable Wm. T. Newman, Judge of said Court:

The petition of Frank C. Shackelford respectfully shows:

I.

That on the 14th day of August, 1912, an involuntary petition in bankruptcy was filed against Jos. N. Webb, of Athens, Ga., and thereafter the said Webb was duly adjudged a bankrupt in said District Court.

II.

That thereafter, to-wit, on Oct. 19th, 1912, petitioner was duly elected trustee of said bankrupt and qualified as such.

III.

That among the property and assets of the said bankrupt which has come into his possession is the dwelling house of the said bankrupt located on Prince Ave., in the City of Athens, and described as follows:

All that lot or parcel of land lying and being in said State and County and in the City of Athens, beginning at a stake on the North Side of Prince Ave., 22 ft. w. of the South-West corner of the

Episcopal Church property, and running thence N. 10¾ W. 300 ft. to a stake, thence N. 79¼ W. 90 ft. to a stake, thence S. 10¾ W. 300 ft. to a stake on Prince Ave., thence on North side 90 ft. to the beginning corner, being the property described in a deed from Elizabeth C. Barrow to J. N. Webb, recorded in Deed Book ZZ, folio 409, in the office of the Clerk of the Superior Court
3 of Clarke County. That said dwelling house property is worth at least $15,000 or more according to the best judgment and opinion of petitioner.

IV.

That on the 29th day of Oct., 1912, the National Bank of Athens, through its attorneys, John J. & Roy Strickland, brought suit in the City Court of Athens against the said J. N. Webb, upon an alleged promissory note in the sum of $12,000 claimed to have been executed and delivered by the said Jos. N. Webb to said bank, and in said suit said bank seeks a special judgment against the above described real estate for the amount of the indebtedness sued on in said case.

Petitioner avers that said bank is seeking said special judgment under and by virtue of an alleged security deed executed and delivered by the said Webb to the said bank on Nov. 6, 1911, but which was not filed for record in the office of the Clerk of the Superior Court of Clarke County until the 14th day of August, 1912, which was the same day upon which the involuntary proceedings in bankruptcy were filed against the said Webb in which he was adjudged a bankrupt.

V.

Petitioner further avers that in said suit such bank is seeking to recover of said Webb, and in its special judgment against the real estate above described 10% of the principal and interest of the said indebtedness as attorney's fees, and in said suit it is alleged that the statutory notice required under the laws of the State of Georgia in order to bind the maker of the promissory note for the payment of attorney's fees therein expressed, was given on the 5th day of Oct., 1912.

VI.

Your petitioner avers that the alleged security deed held by said bank, under which it claims its right to have a special lien against said real estate is invalid as against your petitioner as trustee as aforesaid, and the creditors represented by him in that capacity, for the reason that even though it should have been given for a present consideration, which your petitioner doesn't admit,
4 it was withheld from record for nearly one year, and was not filed for record until the date that said bankruptcy proceedings were instituted as hereinbefore alleged.

VII.

Petitioner further avers that at the time of the filing of the suit by said bank the property against which the special lien is sought

in said suit was already in the custody of the bankrupt court, and said suit is an attempt to interfere with your petitioner as trustee as aforesaid, in the administration of said bankrupt estate.

VIII.

Petitioner further avers that even tho said security deed be held valid that said property is worth more than the amount of the indebtedness claimed to be due said bankrupt, and said property should therefore be administered in the bankrupt court for the benefit of the general creditors, and your petitioner as trustee aforesaid, proposes at the proper time to file in the court of bankruptcy, a petition for leave to sell said real estate, either subject to liens, or with the provision that all valid liens shall attach to the proceeds of said sale and the validity of the alleged lien of said bank can be determined in the Court of Bankruptcy.

IX.

Petitioner further avers that said bank is seeking to burden said property with the additional sum of $1200, or more, as attorneys' fees, which your petitioner avers is not a proper claim against said property, in any event, as against your trustee and the creditors of said bankrupt.

X.

Petitioner further avers that if said suit in the City Court of Athens by said bank is allowed to proceed that judgment will be rendered for said attorneys' fees in addition to the principal and interest claimed to be due on said debt, and the property will be brought to sale by the sheriff at public sale in the usual manner and will be knocked down and sold to the highest bidder regardless of the price that may be offered for same, whereas, should said property be administered in the bankrupt court the sale of the same may be negotiated privately, and if the bids offered are not satisfactory they may be rejected and the trustee is free to negotiate until a satisfactory and adequate price is offered for said property, when the same may be sold. On this account a sheriff's sale of said property would be detrimental to the interest of the general creditors of said bankrupt estate.

XI.

Petitioner alleges that unless the suit filed by the said bank in the City Court of Athens, a copy of which is hereto attached and made a part of this paragraph, is enjoined, that judgment will be rendered in favor of said bank against said Webb and the property hereinbefore described on Tuesday, Nov. 19, 1912, and it is therefore imperative that the further prosecution of said suit should be stayed and enjoined.

XII.

Petitioner further avers that he is without remedy at law or in the State Courts, and therefore applies to this Court for the necessary relief.

Wherefore petitioner prays:

1. That the National Bank of Athens, and its attorneys at law, Jno. J. & Roy Strickland, who are hereby made defendants in this suit, be perpetually enjoined from further prosecuting said suit in the City Court of Athens.

2. That said bank be required to set up in the Court of Bankruptcy any rights it may have as against the real estate hereinbefore described.

3. That an order may be granted restraining said defendants from further prosecuting said suit until a hearing can be had upon this application.

6 4. That petitioner may have such other and further relief as the nature of his case and the principles of equity and justice may require.

5. That subpœna may issue in the usual manner.

(Signed) H. M. HOLDEN,
S. C. UPSON,
COBB & ERWIN,
Attorneys for Frank C. Shackelford, Trustee.

GEORGIA,
Clarke County:

Personally appeared Frank C. Shackelford, who upon oath says that he is the trustee of Jos. N. Webb, and the statements made in his foregoing petition are true, so far as the same may relate to his own acts or deeds, and so far as relates to the acts or deeds of others he believes them to be true.

(Signed) F. C. SHACKELFORD.

Sworn to and subscribed before me on this, the 15th day of Nov., 1912.

(Signed) C. F. CROSSLEY,
N. P., Clarke Co., Ga.

GEORGIA,
Clarke County:

To the City Court of Athens, said County:

The petition of the National Bank of Athens, a corporation with its principal office and place of business in said State and County respectfully shows:

I.

That J. N. Webb of said County is indebted to petitioner in the sum of $12,000.00 principal, $160.00 interest up — Sept. 3, 1912, and interest on the principal sum from that date at 8% per annum, and 10% of principal and interest as Attorneys' fees, and all this notwithstanding homestead, exemption of personalty, the same being waived.

7 II.

The said indebtedness is evidenced by a note of which the following is a copy:

ATHENS, GA., July 6, 1912.

Due Sept. 3.
$12,000.00.

Sixty days after date I promise to pay to the order of National Bank of Athens Twelve Thousand Dollars at the National Bank of Athens, Ga., for value received with interest from date at the rate of 8% per annum until paid secured by deed to house and lot on Prince Ave.

And we, whether maker, endorser, or surety, do hereby each and severally waive and renounce for ourselves and families all right to Homestead and exemption of personalty that we may have under the Constitution and Laws of this State, or of the United States, as against this Note and any renewal thereof. And we agree to pay all costs of collecting the same, including ten per cent of principal and interest as attorney's fees should we, or either of us fail to pay this note on or before the return day of the Court to which suit will be brought for the collection of the same, after the holder of this Note, his Agent or Attorney has notified me in writing ten days before suit is brought of his intention to bring suit, and of the Court and term of the Court to which suit will be brought.

J. N. WEBB. [L. S.]

No. 6048.

III.

Said note described is a renewal, the original note was given on the 6th of November, 1911, and renewed from time to time until the note now sued on was given, thus containing the same debt originally contracted.

IV.

At the time said note was originally made on Nov. 6th, 1911, the said J. N. Webb, for the purpose of securing said note executed and delivered to your petitioner a deed conveying real estate described in said deed as follows, to-wit:

8 "All that lot or parcel of land lying and being in said State and County and in the City of Athens, beginning at a stake on the north side of Prince Ave. and 22 ft. West of the S. W. corner of the Episcopal church property, and running thence N. 10¾ 300 ft. to a stake, thence N. 79¼ W. 90 ft. to a stake, thence S. 10¾ W. 300 ft. to a stake on Prince Ave., thence on the N. side of Prince Ave. 90 ft. to the beginning corner; being the property described in a deed from Elizabeth C. Barrow to J. N. Webb recorded in book "ZZ" folio 409 Clerk's office of said county."

V.

Your petitioner further shows that on the 5th of October, 1912, it delivered to the said J. N. Webb a notice in words as follows, to-wit:

"October 5, 1912.

"Mr. J. N. Webb, Athens, Ga.

"DEAR SIR: This is to notify you that ten days after you have received this notice the National Bank of Athens will file suit against

you to the November Term, 1912, of the City Court of Athens on a note for $12,000.00 principal, dated July 5th, 1912, due in sixty days to National Bank of Athens with interest from date at 8% and signed "J. N. Webb," and will claim 105 of principal and interest on said note as Attorney's fees unless you pay said debt on or before the return day for said term of said Court.

"JNO. J. & ROY M. STRICKLAND,
"Att'ys for National Bank of Athens."

VI.

Your petitioner alleges that said notice was executed in duplicate and one copy served on the said J. N. Webb on the 5th of October, and is now in his possession, cu-tody or control, and notice is hereby given to produce the same at the trial of the above case whenever it may be heard.

9

VII.

Your petitioner further shows that ten days and more have elapsed since said notice was served, and the said J. N. Webb has failed to pay said debt, or any part thereof, on or before this the return day of said City Court of Athens. Whereby he has become liable to your petitioner for 10% of the principal and interest on said note as attorney's fees.

Wherefore petitioner prays as follows:

1. That it have judgment against the said J. N. Webb for principal, interest and attorney's fees and costs.
2. That said judgment be the first lien against the real estate described in this petition as provided by statute in such cases, the same having been deeded to petitioner for the purpose of securing this debt.
3. That process issue to the said J. N. Webb of the County of Clarke requiring him to be and appear at the next City Court of Athens, to be held in and for said county to answer petitioner's complaint.

(Signed) JNO. J. & ROY STRICKLAND,
Petitioner's Attorneys.

(*Order.*)

ATLANTA, GA., Nov. 16, 1912.

The foregoing petition read and considered. Ordered that same be filed and the usual proceedings had. Ordered further that the defendant show cause before me at Atlanta, Ga., on the 23rd day of November, 1912, at 10 o'clock, why the prayer of said petition should not be granted.

Ordered that said defendants be restrained from prosecuting the suit filed by the National Bank of Athens against Jos. N. Webb in the City Court of Athens until the further order of this court.

Ordered further that a copy of the foregoing petition and this

order be served upon the National Bank of Athens, or its attorney at law, at least five days prior to the time fixed for the hearing.

This 16th day of November, 1912.

(Signed) WM. T. NEWMAN,
U. S. Judge.

10 (*Filing.*)

Filed in Clerk's office November 16, 1912.

(Signed) O. C. FULLER, *Clerk,*
By W. G. CORNETT,
Deputy Clerk.

(*Acknowledgment of Service.*)

Due and legal service of the within petition and order of the Judge thereon acknowledged, copy received, subpœna and all further service or notice waived.

This November 18th, 1912.

(Signed) NATIONAL BANK OF ATHENS,
By JNO. P. STRICKLAND, *Att'y.*

(*Filing.*)

Filed in Clerk's Office November 18, 1912.

(Signed) O. C. FULLER, *Clerk,*
By W. G. CORNETT,
Deputy Clerk.

Answer.

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

In the Matter of J. N. WEBB, Bankrupt.

In Bankruptcy. No. 318.

F. C. SHACKELFORD, Trustee in Bankruptcy,
vs.
THE NATIONAL BANK OF ATHENS.

In Equity, etc.

11 Now comes The National Bank of Athens, the defendant in the above case, and answers the several paragraphs of plaintiff's petition as follows:

I.

Defendant can neither admit nor deny the allegations in this paragraph for the want of sufficient information, but is informed that the same is true.

II.

Defendant can neither admit nor deny the allegations in this paragraph for the want of sufficient information, but is informed that the same is true.

III.

Defendant denies the allegations in this paragraph. It denies that the property described in the paragraph has ever been in the possession of said F. C. Shackelford, Trustee, or that as such trustee in bankruptcy he has anything to do with it. It further denies that the property is worth Fifteen Thousand ($15,000) Dollars.

IV.

Defendant admits the allegations in this paragraph, except as to the time when the involuntary proceedings in bankruptcy were filed against the said Webb. It can neither admit nor deny this for the want of sufficient information.

V.

Defendant admits the allegations in this paragraph.

VI.

Defendant denies the conclusion of the pleader in this case. It can neither admit nor deny the allegation as to when the proceeding in bankruptcy was filed, but denies that its deed is void, and denies that the record, or want of record, of the same is any way involved in this case.

12 VII.

Defendant denies the allegations in this paragraph.

VIII.

Defendant denies the allegations in this paragraph that said property is worth more than the amount of indebtedness claimed to be due. The property sold now would not bring this defendant's debt. The property would not bring exceeding Twelve Thousand or Thirteen Thousand Dollars, if placed on the market at this time. The scarcity of money and the depressed condition of finances renders it very undesirable that property should be sold at this time. When times are flushed, Thirteen Thousand Dollars would be a good price for the property. As they are now it would bring very much less. Defendant's debt now amounts to over Thirteen Thousand Seven Hundred Dollars, and the property would not bring it if put on the market.

In addition to defendant's debt secured by its deed, the said J. N. Webb, on the 14th of August, executed a deed to Jack F. Jackson, a deed conveying the same property described in this defendant's deed, which deed was to secure said Jackson in two notes, one for

Five Thousand ($5,000.00) Dollars and another for Five Hundred ($500.00) Dollars. On the same day the said J. N. Webb executed to S. A. Webb a deed conveying said property in consideration of Five Thousand ($5,000.00) Dollars. There is therefore no equity whatever in said property for a bankrupt court to administer. Should the property bring more than the defendant's debt, which defendant alleges is unhoped for, the other deeds described would claim the remainder, if any. There is nothing therefore in said property to be administered by a Trustee for the benefit of any creditors he may represent.

IX.

Defendant admits that it is seeking to recover $1,200.00 or more as Attorney's fee on this debt. It alleges that the same is being done under a contract made in pursuance to the law of Georgia, and defendant alleges that its claim is not only not a burden on the property as charged, but is a legal proper claim, one that
13 is being enforced and collected every day by the court. That it give the statutory notice, filed its suit, and is entitled to have the fees paid out of the property securing this debt.

X.

Defendant denies the conclusion of the pleader in this paragraph. It admits that it was seeking to obtain a judgment against said property, but it was in condition where it was compelled to make the property bring its value for the purpose of protecting its own debt. The bankrupt himself has filed a stay of proceeding in the said case which will necessarily have the effect to suspend judgment until this proceeding has been disposed of.

XI.

Defendant admits that it would have taken judgment at the time alleged, but for the injunction.

XII.

Defendant denies the allegations in this paragraph.

XIII.

Further answering this defendant says, that the said F. C. Shackelford, as Trustee, after having obtained this restraining order has now applied to the Hon. F. L. Upson, Referee, for an order authorizing him to sell the property described in this petition, and such order will be granted, unless restrained.

XIV.

Defendant further shows that all the issues between the Trustee and this defendant are embodied in this suit, and should be settled, before there is any order for the Trustee to sell. If the defendant is right in its contentions of the law, under the facts, then the

Trustee could never sell, inasmuch as there is nothing for him to sell. On the other hand if he is wrong, and the Hon. Judge of this Court should so hold, that would preclude the possibility
14 of any further dispute on the subject. That the questions all being embodied in this case, should be settled by a hearing before an order has been granted authorizing the said Trustee to sell said property. That the said F. L. Upson, Referee, has given notice that he would hear said application at Athens, Georgia, on the 28th day of January, 1913, and at said time such order will be granted unless the said Shackelford is restrained.

XV.

Defendant further shows that it is in the interest of economy and labor that all the questions made be decided in this petition and answer, and that all proceedings be staid in so far as interfering with the property described in petition, until the final judgment in this case.

Wherefore, defendant prays as follows:

1. That F. C. Shackelford, Trustee, be restrained from prosecuting his application for order to sell the land described in the petition of this case, until further order of this Court, and that he eventually be perpetually enjoined.
2. That it be decreed by this Court that there is no interest in the property described in the petition to be administered by F. C. Shackelford, Trustee.
3. That it be decreed that defendant's deed is a valid lien against said property for the amount of its debt, with interest and Attorney's fees, and cost.
4. That defendant have such other and further relief as it is entitled to under the facts in this case, and it will ever pray, etc.
5. That the restraining order be issued by the Clerk.

(Signed) JOHN J. STRICKLAND,
Attorney for the National Bk. of Athens.

15 GEORGIA,
Clarke County:

Personally appeared Jno. J. Strickland, who on oath says that he is the attorney at law for The National Bank of Athens, and as such familiar with the subject matter of the foregoing suit and answer, and of the statements made therein. That the statements made in the foregoing answer are true so far as the same may relate to his own acts and deeds, and so far as they relate to the acts and deeds of others, he believes them to be true.

(Signed) JNO. J. STRICKLAND.

Sworn to and subscribed before me, this 23 day of January, 1913.

(Signed) IRENE HILL,
N. P. Clarke County, Ga.

Order.

ATLANTA, GEORGIA, January 25, 1913.

The foregoing answer read and considered. It is ordered that the same be filed, and usual proceeding had. It is ordered further that the plaintiff F. C. Shackelford, Trustee, show cause before me at Atlanta, Georgia, on the 1st day of Mch., 1913, at 10 o'clock A. M. why the prayer of said answer should not be granted.

It is further ordered that a copy of this answer and order be served upon the said F. C. Shackelford, Trustee, at least five days prior to the time fixed for the hearing.

(Signed) WM. T. NEWMAN,
U. S. Judge.

(*Acknowledgment of Service.*)

Due and legal service of the within answer hereby acknowledged. This the 27th day of January, 1913.

(Signed) F. C. SHACKELFORD,
By C. F. CROSSLEY.

(*Filing.*)

Filed in office and docketed Feby. 24, 1913.

(Signed) O. C. FULLER, *Clerk.*

16 (*Amendment to Petition.*)

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

In the Matter of J. N. WEBB, Bankrupt.

In Bankruptcy. No. 318.

F. C. SHACKELFORD, as Trustee in Bankruptcy of J. N. WEBB,
vs.
NATIONAL BANK OF ATHENS.

In Equity.

And now comes Frank C. Shackelford, trustee of J. N. Webb, Bankrupt, and by leave of the Court amends his petition heretofore filed by adding thereto the following paragraphs:

13. Petitioner, as Trustee as aforesaid, alleges that the security deed held by the National Bank of Athens on the J. N. Webb home place on Prince Avenue in said City of Athens, which is referred to in the petition, is void, and invalid as against this Trustee and the creditors represented by him for the following additional reasons:

(*a*) That said security deed at the time that it was given was

withheld from record from the date of its execution to-wit; November 6, 1911, until the 14th day of August, 1912, for the purpose of preserving the credit of the said J. N. Webb, who was then in a failing or insolvent condition.

(*b*) That said security deed was withheld from record for the period of time mentioned in pursuance of an express agreement between James White, the cashier and managing officer of the National Bank of Athens, and the said J. N. Webb for the purpose of preserving the credit of the said Webb, who, as heretofore alleged, was at said time in an insolvent or failing condition.

(*c*) That said security deed was filed for record in the office of the Clerk of the Superior Court of Clarke county on the same day that the involuntary proceeding in bankruptcy was filed
17 against the said J. N. Webb; that on the day preceding said day, to-wit: on the 13th day of August, 1913, an involuntary proceeding in bankruptcy had been filed against the Webb & Crawford Company, a corporation in which the said J. N. Webb was a large stockholder, and upon whose obligations the said Webb was known by said bank and its officials to be indorser to a considerable amount, and it being known and understood by said National Bank of Athens and its managing officers that the failure and insolvency of said Webb & Crawford Company would precipitate the failure and insolvency of the said J. N. Webb.

(*d*) That the withholding of said security deed from record by said National Bank of Athens was a legal fraud upon the creditors of said J. N. Webb, and petitioner distinctly alleges that a considerable amount of indebtedness due by the said J. N. Webb, bankrupt, as aforesaid, was created after the execution and delivery of said security deed and prior to the record thereof and upon the faith of the apparent clear and unencumbered ownership and title of said real estate in the said Webb.

(*e*) That the withholding of said security deed from record for the period of time referred to was a legal fraud upon all the creditors of the said Webb, whose indebtedness was contracted after the execution and delivery of said deed, but particularly upon one or more of said creditors of the said Webb, viz: Jack F. Jackson, who before crediting the said Webb and before becoming a joint indorser with the said Webb on the paper of the Webb & Crawford Company examined the tax records and the records in the office of the Clerk of the Superior Court of Clarke County with a view of ascertaining whether or not there were any liens or encumbrances against any of the property of said Webb, and finding said records clear of all such liens or incumbrances and the property in controversy appearing upon the tax books in the name of the said J. N. Webb, did then extend credit to the said J. N. Webb and become co-surety with him upon the obligation of the Webb & Crawford Company hereinbefore referred to.

(Signed) H. M. HOLDEN.
S. C. UPSON.
COBB & ERWIN.

18 GEORGIA,
Clarke County:

Personally appeared Frank C. Shackelford, Trustee of J. N. Webb, who upon oath says that the allegations made in the foregoing amendment are true to the best of his knowledge, information and belief.

(Signed) F. C. SHACKELFORD.

Sworn to and subscribed before me this 17th day of June, 1913.

(Signed) W. J. YOUNG,
Notary Public, Clarke County, Ga.

(*Order.*)

The foregoing amendment allowed and ordered filed.
This 18th day of June, 1913.

(Signed) WM. T. NEWMAN,
United States Judge.

(*Filing.*)

Filed in office this 18th day of June, 1913, 2 P. M.

(Signed) O. C. FULLER, *Clerk.*
By W. G. CORNETT,
Deputy Clerk.

19 (*Answer to Amendment.*)

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

In the Matter of J. N. WEBB, Bankrupt.

In Bankruptcy. No. 318.

F. C. SHACKELFORD, as Trustee in Bankruptcy of J. N. WEBB,
vs.
NATIONAL BANK OF ATHENS.

In Equity.

Now comes The National Bank of Athens and answers the amendment filed in the above case designated as No. 13, and the subdivisions thereof as follows:

XIII.

(*a*) Defendant denies the allegations in this subdivision, and the conclusion thereof as alleged.
(*b*) Defendant denies the allegations in this subdivision.
(*c*) Defendant denies the allegations in this subdivision in so far as they relate to J. N. Webb, and his personal liability.

(*d*) Defendant denies the allegations in this subdivision. It likewise moves to strike out the same because immaterial.

(*e*) Defendant denies the allegations in this subdivision as made. It likewise moves to dismiss or strike said subdivision, because immaterial, and because it fails to allege what creditors of said J. N. Webb there were whose debts were contracted after the execution of said deed, and what creditors examined the records, before becoming a joint indorser with the said Webb on the paper of said Webb & Crawford Company.

(Signed) JNO. J. AND ROY M. STRICKLAND,
Att'ys for National Bank of Athens.

GEORGIA,
Clarke County:

Personally appeared James White, who upon oath says that he is cashier of The National Bank of Athens; and that the statements made in the foregoing answers are true as made.

(Signed) JAMES WHITE.

Sworn to and subscribed before me this June 18th 1913.

(Signed) G. F. STEPHENSON,
Notary Public, Clarke Co., Ga.

Approved. June 18, 1913.

(Signed) WM. T. NEWMAN,
U. S. Judge.

(*Filing.*)

Filed in office and docketed June 18, 1913, 2 P. M.

(Signed) O. C. FULLER, *Clerk,*
By W. G. CORNETT,
Dep. Cl'k.

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

In the Matter of J. N. WEBB, Bankrupt.

No. 318. In Bankruptcy.

F. C. SHACKELFORD, as Trustee in Bankruptcy of J. N. Webb,
vs.
NATIONAL BANK OF ATHENS.

In Equity.

Testimony Taken at Athens, Ga., June 18, 1913.

Mr. ERWIN: It is admitted that the involuntary petition was filed on August 14, 1912.

Mr. STRICKLAND: But after the filing of the deed of the National Bank of Athens in the office of the Clerk of the Superior Court for record.

21 Mr. ERWIN: It is agreed further that F. C. Shackelford was elected trustee and qualified as such on Oct. 19, 1912, and is now acting in that capacity.

J. N. WEBB, being sworn testified as follows:

(Direct examination by Mr. HOWELL ERWIN:)

Q. Your name is J. N. Webb?
A. Yes sir.
Q. You are the J. N. Webb referred to in this case?
A. Yes sir.
Q. Did you execute that deed (indicating) to the National Bank of Athens?
A. Yes sir.
Q. The consideration expressed in that deed is $12,000.00, I will get you to state whether or not you as an individual received that from the bank?
A. No, sir, I did not.
Q. What was the transaction?
A. To the best of my recollection Webb & Crawford's account was a little over-checked at the time and several matters had come in that had to be taken care of and I made that deed to the National Bank for $12,000.00 for that and was to be used in the business.
Q. Was it so used?
A. Yes, sir.
Q. Did you receive the money at that time?
A. It was to be put to my credit on the bank's books.
Q. Do you know how much money was to be used to cover overdrafts?
A. No, sir.
Q. Webb & Crawford had already over-checked?
A. Yes, sir.
Q. This $12,000.00 was to cover that?
A. Yes, sir.
Q. You were interested in the Webb & Crawford Company's transaction?
A. Yes, sir.
Q. That corporation is in bankruptcy?
A. Yes, sir.
Q. When was the petition filed against Webb & Crawford?

22 A. I don't recall.
Q. The day before the involuntary petition was filed against you as an individual wasn't it?
A. My recollection is that it was.
Q. What official in the National Bank did you deal with?
A. Captain White.
Q. What connection has he with the bank?
A. Cashier.

Q. Mr. Webb, state whether anything was said at the time about the record of this paper? The time of its execution?

A. My recollection is that Captain White and I had some conversation about it and it was agreed that if this paper went on record it would have a tendency to affect the credit of Webb & Crawford.

Q. Well, what about yours?

t A. I don't remember.

Q. Did Captain White say whether he would or would not have the deed recorded?

A. My recollection is that he said he would not put it on the record.

Q. Who drew the deed?

A. Mr. Tuck.

Q. He is an attorney here?

A. Yes.

Q. Did you want this deed put on the records?

A. I don't know.

Mr. STRICKLAND: I don't see the relevancy of that.

Mr. ERWIN: It is to show the agreement.

Q. Captain White did not put it on record?

A. My recollection is he said he would not have it put on record.

Q. Who suggested Mr. Tuck to prepare this deed?

A. I think I did.

Q. Mr. Webb, at the time this deed was given were you indorser on any of the obligations of the Webb & Crawford Company, if so, about what amount?

23 A. I was indorser on some papers at the Georgia National Bank, some at the National bank, and as to the amounts I can't recall.

Q. Well approximately?

A. About $40,000.00 or $50,000.00 at different places. It might be more or less.

Q. What was the condition of the Webb & Crawford Company at that time?

A. I can't say about that, Mr. Erwin.

Q. Was the corporation in a failing condition?

A. It was pretty hard up.

Q. What was your condition after this?

A. That made me liable for a great deal more.

Q. You were made insolvent by this transaction?

A. Yes, sir.

Q. What length of time had you been dealing with the National Bank of Athens as Webb & Crawford and individually?

A. Webb & Crawford Company from about 1889 or 1890.

Q. Were you connected with the corporation and its predecessor during that time?

A. Yes, sir.

Q. Had you or not had considerable business transactions with Captain White and his bank?

A. Yes, sir.

Q. Did you do the main part of your banking with that institution?
A. Yes, sir.
Q. Was the business of Webb & Crawford a considerable business.
A. Amounted to quite a large sum.
Q. What was its yearly average?
A. Something like $100,000.00 per month as an average.
Q. In giving notes of the Webb & Crawford Company to the National Bank was your individual indorsement required?
A. Yes, sir.
Q. Were you indorser as individual on the notes due this bank by Webb & Crawford at the time this deed was given?
A. Yes.
Q. Can you give an approximate amount of the notes at that time?
24 A. I think about $23,100.00.
Q. Your relation as an individual and the corporation and the bank were pretty closely connected?
A. Yes, sir.

Cross-examination.

By Mr. STRICKLAND:

Q. Mr. Webb, the Webb & Crawford Company was a corporation?
A. Yes, sir.
Q. As such corporation the bank was carrying at the time of your failure three notes amounting to $23,100.00?
A. Yes, sir.
Q. One for $10,000.00 and one for $10,000.00 and one for $3,100.00?
A. Yes, sir.
Q. At the time you got the $12,000.00 in November, 1911, you gave your individual note, and that you renewed from time to time up to July 6, 1912?
A. Yes, sir.
Q. When you got that money you turned it over to the Webb & Crawford Company?
A. Yes.
Q. So you got $12,000.00 and turned it over to Webb & Crawford at the time of the execution of this deed?
A. Yes, sir.
Q. You were a stockholder in that company?
A. Yes, sir. I owned a good block of stock.
Q. About how much?
A. I suppose about 37%.
Q. The bank in September took a deed from the Webb & Crawford Company to secure certain indebtedness mentioned therein, is that the deed (indicating)?
A. Yes, sir.
Q. It bears date September 11, 1912?
A. About that time.

Q. That was the deed to the bank by the Webb & Crawford Company to secure its indebtedness?

A. Yes, sir.

25 Q. Now, Mr. Webb, at the time you borrowed the $12,000.00 in November, 1911, you believed you were then solvent?

A. Up to that time I thought I was.

Q. The Webb & Crawford Company was solvent at that time?

A. I don't know; as I stated we were pretty hard up.

Q. You believed it was solvent?

A. Yes.

Q. You were putting in your own money to pull it out of the hole?

A. Yes.

Q. Mr. Webb, you applied to the bank for the loan of this money?

A. Yes, sir.

Q. Then you made the deed and gave the note and got the money to the credit of the Webb-Crawford Company?

A. Yes, sir.

Q. Now, at that time you were living in the home that this deed covers?

A. Yes, sir.

Q. You are still living there?

A. Yes.

Redirect examination:

Q. Mr. Strickland asked you if this money was not put to the credit of the Webb and Crawford Company; was it so placed?

A. Yes.

Q. It went on the books to the credit of the Webb & Crawford Company?

A. Yes, sir.

Q. Mr. Stickland asked you further whether the result of that was to create an obligation in excess of your assets?

A. Yes, sir.

Q. This other deed given in September covering the store house property, was the same agreement made about withholding it from the record?

A. Yes, sir.

Q. What is the value of your home place?

A. I would consider it worth $15,000.00.

26 Q. What did you pay for the land?

A. $4,000.00, for the two lots. I sold one of the lots to Mrs. Beecham.

Q. You sold off half?

A. Yes, sir.

Q. What did the house cost you to build?

A. I think about $9,000. Then after I built the house I had a heating system put in which cost me between $1,200.00 and $1,400.00, and there was a servants' house and a barn which cost me about $600.00.

Q. So you have an original investment about $14,000.00?

A. Yes, sir.

Q. How long ago was it built?
A. About eight years ago.
Q. I will get you to state whether or not the lot itself has enhanced in value or not?
A. I would not state that the lot is worth quite as much as one down the street about half a block a man paid $4,900.00 for about a year ago.
Q. Did your lot cost you anything in the way of filling in?
A. Yes, sir, it cost me about $350.00 or $400.00.

Recross-examination:

Q. I understood you to state that at the time you signed this $12,000.00 note in 1911, you thought you were solvent?
A. Up to that time I thought I was. Of course I understood that after I took these obligations on myself I was made insolvent.
Q. But if your corporation was solvent your stock in the company would have made you solvent if it was solvent?
A. Yes, sir.
Q. You thought your stock was worth 75% on the dollar?
A. Yes.
Q. If it was worth that you would have been solvent?
A. Yes, sir.
Q. If the company had paid you $12,000.00 that would have left you solvent?
A. As I said awhile ago, I am not in position to say.
27 Q. You thought you were in position to pay or you would not have borrowed the money?
A. If I hadn't thought I could have paid it I would have not put up this $15,000.00.
Q. You thought you could have paid it off?
A. Yes, sir.
Q. What you were trying to do was to pay it up?
A. Yes.
Q. As to the house and lot, I understand the lot cost you $2,000, filling in $400.00, then your house cost you $9,000.00?
A. Yes, between $8,500 00 and $9,000.00, and then the heating system $1,000.00, about $13,200.
Q. Then you built a house which cost you about $600.00?
A. Yes.
Q. It has cost you about $14,000.00.

Redirect:

Q. As to those other notes? As to the time these notes of the Webb & Crawford Company were given you were indorser on them?
A. Yes, sir.
Q. Part of the money went to the credit of the Webb & Crawford Company, to relieve a portion of your liability?
A. I don't know.
Q. I thought perhaps the notes were charges against you in this account. The bank's books will show that anyhow.

28 J. F. JACKSON, being sworn, testified as follows:

Q. Your name is Jack F. Jackson?
A. Yes.
Q. You reside here?
A. Yes, sir.
Q. Do you know Mr. Webb?
A. Yes.
Q. I will ask you whether or not you ever indorsed a note of the Webb & Crawford Company?
A. I indorsed a note for $5,000.00 on August 10, 1912.
Q. What bank?
A. The Georgia National.
Q. What other individuals indorsed the $5,000.00 note with you?
A. Mr. Webb, and he said he would get the other two partners, Mr. Hancock and Mr. Youngkin.
Q. At whose instance did you indorse that note?
A. Mr. Webb's.
Q. And he said he would indorse with you?
A. Yes, sir.
Q. You made that a condition that he and the others should indorse with you?
A. Yes, sir.
Q. What did you suppose was his financial condition?
A. Al- right.
Q. You mean solvent?
A. Yes, sir.
Q. Were you acquainted with various pieces of property at that time that he owned?
A. Yes, sir.
Q. Did you make any investigation of the records as to the Webb & Crawford Company and Mr. Webb individually?
A. I went up and examined the tax books of the city and I found that Webb & Crawford paid taxes on about $90,000.00, and J. N. Webb about $12,000. I didn't find any of Mr. Youngkin's and Mr. Hancock's.
Q. To what place did you go then?
A. I went to the courthouse and examined the records there.
Q. What records did you examine?
A. I examined the deeds and mortgages in the clerk's office.
29 Q. Did you find any incumbrances against Mr. Webb's home place?
A. I found that he had mortgaged an old house and lot on Broad Street to Mrs. Lucas and also a piece of land in the country for about $14,000.00.
Q. Did you find any record of the security deed to his store house?
A. No, sir.
Q. Now, Mr. Jackson, I understand you made this examination of the records in the city hall and the clerk's office before signing this note as indorser?
A. Yes, sir.
Q. For what purpose did you make this investigation?

A. To see if I would be safe in going on the note.
Q. You knew he owned this Prince Avenue place?
A. Yes.
Q. If you had found a mortgage against it would you have indorsed this paper?
A. No, sir.
Q. This $5,000.00 that you signed as indorser what was the final outcome as to your liability?
A. I had to pay it.
Q. Have you been paid back?
A. No, sir. A. I got a dividend of 15%.
Q. There is 85% unpaid?
A. Yes, sir.
Q. Was any security given you as to that note?
A. A security deed to his house and lot?
Q. I mean at the time you signed up?
A. No, sir.
Q. You mentioned something about security, that was the deed that was given on the day of the failure?
A. It was about the 12th day of August I think he gave me the deed.

Cross-examination:

Q. Mr. Jackson you signed this note on the 6th of August, 1912?
A. I think it was the 10th.
Q. You thought that the Webb & Crawford Company was solvent?
A. Yes.
Q. It was the Webb & Crawford Company you indorsed for?
A. Yes.
Q. And you and Webb were jointly indorsing for that purpose?
A. Yes, sir.
Q. There were two others also?
A. Yes, sir.
Q. You believed that the individual members were solvent also, and you wouldn't have signed it but for the fact that they were solvent?
A. Yes, sir.
Q. You knew as a matter of fact that the National Bank had a mortgage?
A. Mr. Webb state- that morning that there was a mortgage and that was the first time I heard of it.
Q. You got a deed second to the bank's deed?
A. Yes, sir.
Q. You had it put on record?
A. Yes, sir.
Q. What is the house on Prince Avenue worth now?
A. I suppose about $12,000.00 or $13,000.00.
Q. $13,000.00 would be a good price for it, wouldn't it?
A. Yes.

Q. Would you give that for it?
A. Yes, sir.
Q. Would you give $14,000.00 for it?
A. I don't know whether I would or not.
Q. Would you give $13,500.00?
A. I don't know, sir.

Redirect:

Q. You have a home?
A. Yes, sir.

31 R. T. DUBOSE, being duly sworn, testified as follows:

Q. You are in the real estate business here?
A. Yes, sir.
Q. You sold Mr. Webb his home place?
A. Yes.
Q. What is the marked value of the property?
A. About $15,000.00.

Cross-examination:

Q. Can you sell it for that?
A. I don't know whether I could or not.
Q. Property depreciates in value, doesn't it?
A. I think that the increased value of property his place has not depreciated.

F. A. LIPSCOMB, being sworn, testified as follows:

Q. What is your business?
A. Real estate and fire insurance.
Q. How long?
A. About 21 years.
Q. Mr. Lipscomb you know Mr. Webb's property in this city, from your knowledge of real estate what is it worth?
A. I would put my min-um [minimum] figure at between $12,-500.00 to $15,000.00.

D. G. ANDERSON, being sworn, testified as follows:

Q. You are in the real estate business?
A. Yes, sir.
Q. You are acquainted with Mr. Webb's property?
A. Yes, sir.
Q. About how much is it worth?
A. I should say between $12,000.00 and $15,000.00.

32 W. A. MALLORY, being sworn, testified as follows:

Q. You know the J. N. Webb home place, what is it worth?
A. It is well worth $14,000.00.

J. J. WILKINS, being sworn, testified as follows:

Q. What is your business?
A. President of the Georgia National Bank of this city.
Q. Did the Webb & Crawford Company owe your bank any money at the time of this failure?
A. About $32,500.00, including the Jackson paper.
Q. Mr. Jackson indorsed it, and you required him to pay it?
A. Yes.
Q. Did you know about the deed having been given to the National Bank?
A. No, sir.
Q. When did you first learn of it?
A. At the time of its record.
Q. When you loaned the money to the Webb & Crawford Company did you require any individual indorsements?
A. Yes, sir. I require individual indorsements on all notes.
Q. Who indorsed for them?
A. Mr. Webb and later some other indorsers.
Q. Mr. Webb was indorser on all the papers?
A. Yes.
Q. Would you have continued to loan money to them if you had known he had given security deed to the other bank?
A. No, sir.

Cross-examination.

Q. All of your paper is indorsed by somebody besides Webb?
A. Not all.
Q. How much is not?
A. $27,500.00, I think.
Q. In the first of the year 1912 didn't the Webb & Crawford Co. make a statement to your bank?
A. Some time previous to that—probably the middle or fall of 1911, perhaps.
33 Q. November or December?
A. I forget.
Q. What was the statement?
A. It showed $13,000.00 over and above liabilities.
Q. The Webb & Crawford Company had been doing business in your bank for a long while?
A. Yes, sir.
Q. You said that they owed you $32,000.00, including the Jackson paper? Does that include the other bank, the American State Bank? Was that all?
A. No, sir; they owed me individually?
Q. Did they owe the other bank anything?
A. About $17,000.00.
Q. And you individually?
A. $5,000.00.
Q. What was the date of the individual debt?
A. In April, 1912.

Redirect examination:

Q. You have spoken of the debts of the Webb & Crawford Company and indorsements, and the American State Bank, now this $5,000.00 note bore Mr. Webb's indorsement?

A. Yes, sir.

Q. You as an individual had you known of the security deed would you have let the $5,000.00?

A. No, sir.

Recross:

Q. If you knew the Webb & Crawford Company was worth $13,000.00 net you would have lent to them?

A. No, sir.

Q. Why?

A. Because I require personal indorsement on all paper.

Mr. STRICKLAND: We put in, first, the deed from J. M. Webb to the National Bank, recorded August 14, 1912, at 12:05 P. M.

We also put in the note for $12,000, dated July 5, 1912.

We also put in 3 notes all given by the Webb & Crawford Company to the National Bank of Athens, one for $10,000.00
34 dated July 28, 1912; one for $10,000.00 dated July 26, 1912, and one for $3100.00 dated July 26, 1912.

We also put in the deed from the Webb & Crawford Company to the National Bank dated September 12, 1911, and left for record August 14, 1912, at 12:05 P. M.

We next put in deed from J. N. Webb to J. F. Jackson, dated August 14, 1912, filed for record at 5:30 P. M. August 14, 1912.

JAS. WHITE, being sworn for the defense testified:

(Examination by Mr. STRICKLAND:)

Q. What relation did you have with the National Bank of Athens in 1911, and for years prior thereto, and now?

A. Cashier.

Q. As such, I will get you to state whether or not you loaned J. N. Webb any money on or about November 6, 1911?

A. I made him a loan of $12,000.00.

Q. What became of that $12,000.00?

A. I think it was put — the credit of Webb & Crawford's account. He borrowed it individually and had it transferred to the account of Webb & Crawford Co. He had no account with us and it was put *the* [to] the credit of the company.

Q. Did you take a deed to his house and lot to secure that note?

A. Yes, sir.

Q. By that transaction the bank put $12,000.00 as ordered by Mr. Webb, and therefore he got the benefit of it?

A. Yes, sir.

Q. What was said about recording the deed to him that day?

A. I don't think there was any question about it.

Q. You didn't record it—why didn't you?

A. I thought that there was no special risk about it.

Q. Did you keep that deed of the record for the purpose of affecting any other creditor?

A. No, sir.

Q. Or for the purpose of deceiving anybody?

A. I didn't think anything of the sort. It was only a temporary loan and he had hopes of taking it up.

35 Q. What length of time?

—. He made it 60 days, and he hoped to gradually bring it down.

Q. This was a renewal note that was made for 60 days up to this time?

A. Yes, sir.

Q. At the time you took this note and loaned Mr. Webb the $12,000 I will get you to state whether or not you believed him solvent?

A. Yes, sir.

Q. Did he make any statement to you about his condition?

A. No.

Q. With reference to that paper?

A. I loaned him another $10,000 on his statement that the stock was good. I don't remember when he made the statement. At any rate it was $10,000.00. For a long time his indebtedness was only $13,500.00. The first money he borrowed was this $12,000.00.

Q. Do you know whether or not anybody knew of the existence of this deed from Mr. Webb to the bank before you put it on record.

A. No, sir. I don't understand the question.

Q. Do you know of anybody else than the bank and Webb knowing that he had executed this deed to his house and lot?

A. No, sir.

Q. Then as I understand it, this was a present consideration of $12,000.00 that you took that deed, that you thought Webb was solvent and you kept it off the record for any purpose, and you didn't do it for the purpose of affecting his credit, one way or the other?

A. No, sir.

Cross-examination:

Q. Do you know what part of this $12,000.00 was applied to pay existing indebtedness due the bank?

A. No, sir.

Q. Was there an overdraft?

A. I don't think there was.

Q. Does the extract from the books cover this?

A. Yes.

36 Q. Was the insurance transferred to the bank?

A. No, sir.

Q. The effect of giving a deed of this sort invalidates the insurance, doesn't it?

A. I don't know.

Q. You knew as a business man that the effect was to invalidate the insurance policy?

A. No, sir. He was to keep the insurance up.

Q. Did you ask him to have the proper notation put on the policy?

A. I don't recall. I considered the property worth the money when I made the loan and I expected him to keep the insurance paid up.

Q. Did you expect him to have the transfer made?

A. No, sir.

Q. Isn't it not true that there was secrecy attending the execution of this paper?

A. No, sir.

Q. How did Mr. Tuck happen to draw this paper?

A. I don't know, sir.

Q. Is it not true that you knew that Cobb & Erwin represented Webb & Crawford, and you knew that the firm of Cobb & Erwin represented the Georgia National Bank?

A. Yes, sir.

Q. You knew that I was a director of the Georgia National Bank and you feared that the execution of this paper would cause a bad effect on the credit of the Webb & Crawford Company and J. N. Webb?

A. No, sir.

Q. Is it not true that Cobb & Erwin was not called on to draw these papers because I would have to convey it to the banks I represented?

A. No, sir.

Q. You say that there was no agreement about withholding it from the record?

A. No, sir.

Q. Didn't you make the statement to me that you would not put it on?

A. No, sir.

Q. Are you speaking from the best of your recollection or are you positive?

A. From my own knowledge.

37 Q. Why did you put in on record

A. When I found out of the failure I had it recorded.

Q. You knew that Mr. Webb had indorsed for the corporation very heavily?

A. Only as to my bank.

Q. You had every reason to believe that he was indorser on other notes?

A. No, sir.

Q. You knew the effect of the failure of the Webb & Crawford Co., would *be* result in the failure of Mr. Webb?

A. No, sir.

Q. Didn't you know that Mr. Webb's property largely consisted in his holdings in the Webb & Crawford Company?

A. No, sir.

Q. When the failure come you had the deed put on record?

A. Yes, sir.

Q. You made a statement to Mr. Strickland at the time of this transaction that you thought the Webb & Crawford Company was insolvent?

A. Yes, sir.

Q. Is it not true that you knew they were hard pressed?

A. Mr. Webb told me that the stock was worth 75¢ on the dollar.

Q. What was the par value of the stock?

A. $100.00.

Q. Then the statement he made to you was that the stock was below par?

A. Yes, sir. The stock was worth at least 75¢ in the dollar.

Q. You didn't know that he was hard pressed?

A. No, sir; I didn't believe them insolvent.

Q. You knew they were hard up?

A. Some of the best men in this town get hard up sometimes.

Q. You knew that Webb & Crawford were engaged in what is called kiting?

A. Yes, sir. They hadn't been doing it for a long time.

Q. When did you learn that?

A. Two or three years ago.

Q. That was prior to the time of the execution of this deed and they were hard pressed and they stopped?

38 A. They stopped so far as my bank was concerned.

Q. As a business man did you know that deed would affect their credit, and to have put on record that deed to the store house property expressing a consideration of $30,000.00, and the deed on his house and lot would cause them financial trouble?

A. It all depends on whether they were insolvent or not. If they had been as they represented it would have no effect at all.

Q. Is it not a fact that at the time this occurred there were reports and rumors that they were embarrassed?

A. Mr. Erwin I loaned them $22,000.00 about that period and if I had believed they were in that condition I would not have loaned them a dollar.

Q. Isn't it an unusual circumstance for a business to put a deed on its storehouse for $30,000.00?

A. That is unusual in this community.

Q. You don't hear of such concerns as Talmadge Brothers, Arnold-Canning Co., or other big concerns doing this, so is it not an unusual transaction?

A. I think it is.

Q. And the record of the deed would excite unfavorable comment as to the financial condition?

A. I should think it would.

Q. And transactions of that sort are unusual transactions, are they not?

A. I don't know about that. We have some peculiar transaction-.

Q. Can you specify some of them?

A. My impression is that it was not much. I don't know that it was.

Q. The transaction involved the giving of a deed that was handled by you, wasn't it?

A. Yes.

Q. You made the transaction?

A. Yes, sir.

Q. You say you didn't make an arrangement to withhold these deeds from record?

A. No, sir.

Q. Did he express a desire to keep them from the record?

A. No, sir. Nothing was said about it at all.

39 Q. Mr. H. C. Tuck, who prepared this deed from J. N. Webb, is a reputable practicing attorney?

A. Yes, sir.

Q. And so far as the insurance that is handled by the attorneys?

A. Yes, sir.

Q. Nothing was said about the insurance expect [except] that he was to keep it up?

A. I relied upon him to see that it was attended to.

(*Opinion.*)

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

No. —. In Equity.

F. C. SHACKLEFORD, as Trustee in Bankruptcy of J. N. Webb, Complainant,

vs.

NATIONAL BANK OF ATHENS, Defendant.

After carefully considering the record, including the testimony taken in this case, I am clearly of the opinion that the case is controlled by the fact of the non-recording of the mortgage by the National Bank of Athens. If the testimony of Webb, the mortgagor, is true, then Captain White, the cashier of the National Bank of Athens, agreed expressly not to record the mortgage. This testimony is as follows:

Q. What official of the National Bank did you deal with?

A. Captain White.

Q. What connection has he with the bank?

A. Cashier.

Q. Mr. Webb, state whether anything was said at the time amount [about] the record of this paper? The time of its execution?

A. My recollection is that Captain White and I had some conversation about it and it was agreed that if this paper went on record it would have a tendency to affect the credit of Webb & Crawford.

Q. Well, what about yours?
A. I don't remember.
Q. Did Captain White say whether he would or would not have the deed recorded?
A. My recollection is that he said he would not put it on the record."

Again he says, in answer to the question by counsel:

Q. Captain White did not put it on record?
A. My recollection is he said he would not have it put on the record.

Captain White, the cashier, in his testimony, said, in answer to question by counsel:

Q. What was said about recording the deed to him that day?
A. I don't think there was any question about it.
Q. You didn't record it—why didn't you?
A. I thought that there was no special risk about it.
Q. Did you keep that deed off the record for the purpose of affecting any other creditor?
A. No, sir.
Q. Or for the purpose of deceiving anybody?
A. I didn't think anything of the sort. It was only a temporary loan and he had hopes of taking it up."

The testimony of J. K. Jackson, to me, is controlling in this matter. It appears that Jackson was asked to indorse a note for Webb & Crawford and he went to the record and examined it to see if there was any incumbrances either against Webb & Crawford or the members of the firm. Finding no such incumbrances he made the indorsement and had to pay the note of five thousand dollars.

His testimony is as follows:

Q. Your name is J. F. Jackson?
A. Yes, sir.
Q. You reside here?
A. Yes, sir.
Q. Do you know Mr. Webb?
A. Yes.
Q. I will ask you whether or not you ever indorsed a note of the Webb & Crawford Company?
A. I indorsed a note for $5,000.00 on August 10, 1912.
Q. What bank?
A. The Georgia National.
Q. What other individual indorsed the $5,000.00 note with you?
A. Mr. Webb, and he said he would get the other two partners, Mr. Hancock and Mr. Youngkin.
Q. At whose instance did you indorse that note?
A. Mr. Webb's.
Q. And he said he would indorse with you?

A. Yes, sir.

Q. You made that a condition, that he and the others should indorse with you?

A. Yes, sir.

Q. What did you suppose was his financial condition?

A. Al- right.

Q. You mean solvent?

A. Yes, sir.

Q. Were you acquainted with various pieces of property at that time that he owned?

A. Yes, sir.

Q. Did you make any investigation of the records as to the Webb & Crawford Company and Mr. Webb individually?

A. I went up and examined the tax books of the city and found that Webb & Crawford paid taxes on about $90,000.00, and J. N. Webb about $12,000. I didn't find any of Mr. Youngkin's or Mr. Hancock's.

Q. To what place did you go then?

A. I went to the court house and examined the records there.

Q. What records did you examine?

A. I examined the deeds and mortgages in the clerk's office

Q. Did you find any incumbrances against Mr. Webb's home place?

A. I found that he had mortgaged an old house and lot on Broad Street to Mrs. Lucas and also a piece of land in the country for about $14,000.00.

Q. Did you find any record of the security deed to this storehouse?

A. No, sir.

Q. Now, Mr. Jackson, I understand you made this examination of the records in the city hall and at the clerk's office before signing this note as indorser?

A. Yes, sir.

Q. For what purpose did you make this investigation?

A. To see if I would be safe in going on the note.

Q. You knew that he owned the Prince Avenue place.

A. Yes.

Q. If you had found a mortgage against it, would you have indorsed this paper?

A. No, sir.

Q. This $5,000.00 that you signed as indorser, what was the final outcome as to your liability?

A. I had to pay it.

42 Q. Have you been paid back?

A. No, sir. I got a dividend of 15%.

Q. There is 85% unpaid?

A. Yes, sir.

Q. Was any security given you as to that note?

A. A security deed to his house and lot?

Q. I mean at the time you signed up?

A. No, sir.

Q. You mentioned something about security, that was the deed that was given on the day of the failure?
A. It was about the 12th day of August, I think he gave me the deed.

Cross-examination.

Q. Mr. Jackson, you signed this note on the 6th day of August, 1912?
A. I think it was the 10th.
Q. You thought that the Webb & Crawford Company was solvent?
A. Yes.
Q. It was the Webb & Crawford Company you indorsed for?
A. Yes, sir.
Q. You and Webb were jointly indorsing for that purpose?
A. Yes, sir.
Q. There were two others also?
A. Yes, sir.
Q. You believed that the individual members were solvent also, and you wouldn't have signed it but for the fact that they were solvent?
A. Yes, sir.
Q. You knew as a matter of fact that the National Bank had a mortgage?
A. Mr. Webb stated that morning that there was a mortgage and that was the first time I heard of it.
Q. You got a deed second to the bank's deed?
A. Yes, sir.
Q. You had it put on record?
A. Yes, sir.
Q. What is the house on Prince Avenue worth now?
A. I suppose about $12,000.00 or $13,000.00.
Q. $13,000.00 would be a good price for it, would it not?
A. Yes, sir.
Q. Would you give that for it?
A. Yes.
Q. Would you give $14,000.00 for it?
A. I don't know whether I would or not.
Q. Would you give $13,000.00 for it?
A. I don't know.

43 Redirect examination:

Q. You have a home?
A. Yes, sir.

Under any view of the facts, assuming the testimony of Captain White to be true, and leaving out of view entirely the testimony of Webb, it seems clear that this instrument would be void and ineffective as against Jackson. He assumed the liability as indorser on the Webb & Crawford paper because he found no incumbrances against them, and says expressly that he would not have indorsed for them if he had found these incumbrances. It seems to me there

is no law and no authorities anywhere under which the mortgage could be enforced against Jackson.

If it is invalid as to Jackson, then under the decision of the Circuit Court of Appeals for this Circuit, in re Dugan, 183 Fed. 405, it would be void as to all the creditors. Other authorities might be cited, but I think the rule in the Dugan case must control as it was rendered by the Cirucit Court of Appeals for this circuit.

Having this view of the case, it is unnecessary to consider any of the other interesting questions discussed by counsel at the bar and in the briefs submitted by them.

Counsel have apparently agreed to submit the matter on its merits, judging by their statement in open court and in their briefs, as to the validity of this mortgage and its effects as a prior lien. There is an amendment to the bill which is sufficient so far as the allegations go, but what the bill seems to lack is a prayer or prayers for the relief indicated by the amendment. There is a general prayer for relief attached to the original bill.

The National Bank of Athens, so far as I can see, must stand as a general creditor of the bankrupt estate. The trustee is entitled to a decree carrying into effect what is stated above.

This 17th day of July, 1913.

(Signed) WM. T. NEWMAN,
U. S. Judge.

Filing.

Filed in clerk's office 4:00 P. M. July 17, 1913.
O. C. FULLER, *Clerk,*
By F. L. BEERS, *Deputy.*

44 (*Decree.*)

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

No. —. In Equity.

F. C. SHACKELFORD, as Trustee in Bankruptcy of J. N. Webb, Complainant,
vs.
NATIONAL BANK OF ATHENS, Defendant.

After argument had upon the final hearing in this case and upon consideration thereof, it is ordered, adjudged and decreed, as follows:

1st. That the suit of the National Bank of Athens against J. N. Webb, now pending in the City Court of Athens, referred to in the pleadings, be and the same is hereby enjoined.

2nd. That the deed held by the National Bank of Athens be and the same is hereby decreed void as against general creditors for the reasons stated in the opinion filed in this case July 17th, 1913.

3rd. That the property involved in this litigation, to-wit, the house and lot described, be administered by F. C. Shackelford, trustee, free from the claim of lieu of the National Bank of Athens.

4th. That F. C. Shackelford, trustee, recover from the National Bank of Athens $— costs of this proceeding.

This 19th day of July, 1913.

(Signed) WM. T. NEWMAN,
U. S. Judge.

(*Filing.*)

Filed in clerk's office 2:00 P. M. July 19, 1913.

(Signed) O. C. FULLER, *Clk.*,
By W. G. CORNETT, *Dep. Clk.*

45 (*Petition for Appeal.*)

In the District Court of the United States for the Eastern Division of the Northern District of Georgia.

In Equity.

No. —. In Bankruptcy.

In the Matter of J. N. WEBB, Bankrupt.

F. C. SHACKELFORD, Trustee,
vs.
NATIONAL BANK OF ATHENS.

To the Honorable W. T. Newman, District Judge of the United States for the Northern District of Georgia:

The petition of the National Bank of Athens respectfully shows:

That in the above entitled case F. C. Shackelford, trustee, applied to this Honorable Court on the equity side for an order to enjoin your petitioner from pressing a suit in the State Court asking a special lien on certain real estate therein described and praying that a deed held by petitioner be concelled upon the ground that it created a preference, not having been recorded when taken. Your petitioner filed an answer setting up that its deed was valid and was not a preference and praying that its debt be decreed to be first paid out of the property involved. The case was heard before the Honorable W. T. Newman, Judge — on the 17th day of of July, 1913, he passed a final order holding that said deed was a preference and void and adjudging that the trustee should administer said property. The National Bank of Athens, conceiving itself aggrieved by the said final order and decree entered as above stated in the above entitled proceeding, now within ten days therefrom, does hereby petition for an appeal from said order and decree to the United States Circuit Court of Appeals for the Fifth Circuit and prays that its appeal

may be allowed and a citation granted directed to F. C. Shackelford, trustee, for J. N. Webb, commanding him to appear before the United States Circuit Court of Appeals for the Fifth Circuit to do and receive what may appertain to justice to be done in
46 the premises, and that a transcript of the records, proceedings and evidence in said proceedings, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit.

(Signed) JNO. R. WHITE,
President of the National Bank of Athens.
JNO. J. & ROY M. STRICKLAND,
Attorneys for the National Bank of Athens.

Witness:
IRENE HILL,
N. P., Clarke Co., Ga.

Order Allowing Appeal.

At Atlanta, Georgia, on the 19th Day of July, 1913.

It is ordered that the within appeal be and the same is hereby allowed and approved.

(Signed) WM. T. NEWMAN,
Judge United States District Court.

Filing.

Filed in office and docketed 2:00 P. M., July 19, 1913.

(Signed) O. C. FULLER, *Clerk,*
By W. G. CORNETT,
Deputy Clerk.

47 (*Assignment of Errors.*)

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

In Equity.

In the Matter of WEBB & CRAWFORD COMPANY, Bankrupt.

F. C. SHACKELFORD, Trustee for J. N. Webb,
vs.
NATIONAL BANK OF ATHENS.

And now on this the 19th day of July, 1913, comes the National Bank of Athens, plaintiff in error and appellant, by Jno. J. and Roy M. Stickland, its solicitors, and file- the following assignment of errors, and says that the final order and decree entered on the 19th

day of July, 1913, in the above entitled proceeding, enjoining the National Bank of Athens, and decreeing that its deed was not a valid lien, and decreeing that appellant should pay the cost in said proceeding are erroneous, and against the just rights of said plaintiff in error, and appellant, for the following reasons, to-wit:

I.

Because the said District Court erred in holding and ruling that a deed executed under the laws of Georgia to secure a debt created at the time of the execution of the deed, and more than four (4) months prior to bankruptcy was invalid under the bankrupt law as to other creditors.

II.

Because the said District Court erred in holding and ruling that a deed executed to secure a debt created at the time of its execution must be recorded more than four (4) months before bankruptcy in order to be valid as against the trustee for common creditors.

III.

Because the said District Court erred in holding and ruling in effect that the deed given to the National Bank of Athens
48 set out in the record was void as to all other creditors, because not recorded more than four (4) months before bankruptcy whether such creditors had liens or not.

IV.

Because the said District Court erred in holding and ruling in effect that the trustee when appointed took as a judgment creditor as of the date when petition for bankruptcy was filed; and further holding that such trustee would get a superior lien to an unrecorded deed created by contract; and in thus holding that a lien created by law, under the recording statute of Georgia, would be superior to a lien created by contract and under said statute could contest with such lien by contract.

V.

Because the said District Court erred in holding and ruling in effect that a deed executed to secure a present debt under the recording law of Georgia is void as against a judgment obtained by law unless such deed is recorded.

VI.

Because the said District Court erred in holding and ruling in effect that the recording statutes of Georgia would render a deed void if unrecorded as against a trustee in bankruptcy.

VII.

Because the said District Court erred in holding and ruling in effect that the deed made to the National Bank of Athens, though filed for record at noon before the petition in bankruptcy was filed at 9 o'clock thereafter on the same day was void. The statutes of Georgia provides that the day and hour a paper is filed shall be entered thereon and the deed in question filed for record at 12 o'clock noon became a perfect lien as against an application in bankruptcy filed at 9 o'clock the night of the same date and the Court erred in not so holding.

49 VIII.

Because the said District Court erred in holding in effect that the bank's deed was void as against J. F. Jackson, who had signed a note for the Webb & Crawford Company as security with J. N. Webb. He not in any sense being a creditor, nor having obtained any liens by contract on the property conveyed by the bank's deed.

IX.

Because the said District Court erred in holding in effect that J. F. Jackson, who took a deed second to and recognizing the banks deed from J. N. Webb was not estopped to attack the deed recited in his deed.

X.

Because the said District Court erred in granting a decree that the property covered by the National Bank of Athens' deed should be sold freed from said deed, and thus holding said deed constituted a preference under the bankruptcy law and was void.

XI.

Because the said District Court erred in not holding and ruling that the National Bank's deed was a valid substituting lien as against the trustee, and all others, and in not decreeing that the property should be sold and the bank's debt, including principal, interest and attorneys' fees, paid.

XII.

Because the said District Court erred in enjoining the suit of the National Bank of Athens against J. N. Webb, and in decreeing that the bank should pay the costs in this case.

Wherefore, the said appellant prays, that the said final order, decree and judgment be reversed, and that the said District Court be directed to enter a decree and judgment to the effect that the
50 National Bank of Athens' deed is a valid lien and that its principal, interest and attorneys' fees, including cost, be paid from the proceeds of the property in question when the same is sold.

(Signed) JNO. J. & ROY M. STRICKLAND,
Solicitors for Appellant.

(*Filing.*)

Filed in office and docketed 6:30 P. M., July 25, 1913.

(Signed) O. C. FULLER, *Clerk*,
By W. G. CORNETT, *Dep. Clk.*

(*Prayer for Reversal.*)

In the United States Circuit Court of Appeal- for the Fifth Circuit.

In Bankruptcy, etc.

THE NATIONAL BANK OF ATHENS, Plaintiff in Error and Appellant,
vs.
F. C. SHACKELFORD, Trustee for J. N. Webb.

Now comes the National Bank of Athens, plaintiff in error, in the above stated case, and appellant, and prays for a reversal of the final order, decree, and judgment of the U. S. District Court for the Northern District of Georgia in the equitable petition brought by F. C. Shackelford, trustee for J. N. Webb, for the purpose of enjoining the National Bank of Athens from suing to judgment in the City Court of Athens, a suit on a note with a prayer for special lien on land therein described, and to declare the deed held by the National Bank of Athens void. In which case judgment and decree was rendered by said District Court on the 19th day of July, 1913, granting said injunction and decreeing that the deed of the National Bank of Athens was void for the reasons assigned in an opinion filed by the Judge of said District Court on the 17th day of July, 1913.

(Signed) JNO. J. & ROY M. STRICKLAND,
Solicitors for Appellant National Bank of Athens.

(*Filing.*)

Filed in office and docketed 6:30 P. M., July 25, 1913.

(Signed) O. C. FULLER, *Clerk*,
By W. G. CORNETT, *Dep. Clk.*

51 (*Order for Bond.*)

In the District Court of the United States for the Eastern Division of the Northern District of Georgia.

In Equity.

No. —. In Bankruptcy.

In the Matter of J. N. WEBB, Bankrupt.

F. C. SHACKELFORD, Trustee,
vs.
NATIONAL BANK OF ATHENS.

The National Bank of Athens, having made application to appeal the above stated case to the United States Circuit Court of Appeals and the same having been allowed, it is ordered that upon the said National Bank of Athens entering into bond in the sum of One Thousand Dollars, with security to be approved by W. G. Cornett, Deputy Clerk at Athens, Georgia, payable to F. C. Shackelford, Trustee, conditioned to prosecute its appeal and answer for all damages and costs if it should fail to make said appeal good, then said bond shall act as a supersedeas until further order of this Court. It is further ordered that said bond, when executed, be approved, as to surety by W. G. Cornett, Deputy Clerk.

July 19, 1913.

(Signed) WM. T. NEWMAN,
Judge United States District Court.

(*Filing.*)

Filed in office and docketed 2:00 P. M., July 19, 1913.

(Signed) O. C. FULLER, *Clerk,*
By W. G. CORNETT, *Dep. Clk.*

52 (*Order Approving Trustee's Bond.*)

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

No. 318. In Bankruptcy.

In the Matter of Jos. N. WEBB, Bankrupt.

At a Court of Bankruptcy Held in and for the Northern District of Georgia, at Athens, This 19 Day of October, A. D. 1912.

Before Frank L. Upson, Referee in Bankruptcy.

It appearing to the Court that Frank C. Shackelford, of Athens, and in said District, has been duly appointed Trustee of the estate

of the above-named bankrupt, and has given bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors, to-wit: in the sum of One Thousand Dollars, it is ordered that the said bond be, and the same is hereby approved.

(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

(*Filing.*)

Filed 10:45 o'clock A. M. this 19 day of Oct., 1912.

(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

53 (*Warrantee Deed from J. N. Webb to the National Bank of Athens.*)

STATE OF GEORGIA,
Clarke County:

This indenture, made and entered into this 6th day of November in the year of Our Lord, One Thousand Nine Hundred and Eleven, between J. N. Webb of the County of Clarke, State of Georgia, of the first part, and the National Bank of Athens, of the County of Clarke, State of Georgia, of the second part.

Witnesseth, that the said J. N. Webb, for and in consideration of the sum of Twelve Thousand ($12,000.00) Dollars, in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, convey and confirm unto the said National Bank of Athens, and its assigns, all the following described property, to-wit:

All that lot or parcel of land lying and being in said State and County and in the City of Athens, beginning at a stake on the north side of Prince Avenue and 22 feet west of the S. W. corner of the Episcopal church property, and running thence N. 10 3-4 E. 300 feet to a stake; thence N. 79 1-4 degrees; W. 90 feet to a stake; thence S. 10 3/4 degrees W. 300 feet to a stake on Prince Avenue; thence on the north side of Prince Ave., 90 feet to the beginning corner, being the property described in deed from Elizabeth C. Barrow J. N. Webb, recorded in Book "ZZ," folio 409, Clerk's office, said County.

To have and to hold the said described property, with all and singular the rights, members and appurtenances thereunto appertaining, to the only proper use, benefit and behoof of the said National Bank of Athens and its assigns, in fee simple; and the said J. N. Webb, the said bargained lot or parcel of land, with all improvements thereon unto the said National Bank of Athens, its successors and assigns, against the said J. N. Webb, his heirs, executors and administrators, and against all and every other person or persons, shall and will warrant and forever defend, by virtue of these presents.

In witness whereof, the said J. N. Webb has hereunto set
54 his hand and affixed his seal and delivered these presents, the day and year first above written.

[SEAL.] (Signed) J. N. WEBB.

Signed, sealed and delivered in presence of us:

(Signed) Mrs. V. V. RADER,
J. M. HOWELL,
N. P., Clarke County, Ga.

GEORGIA,
Clarke County:

Office of Clerk Superior Court.

Filed for record at 12:05 o'clock P. M., this 14 day of Aug., 1912.
(Signed) E. J. CRAWFORD, *Clerk.*

Recorded Aug. 14, 1912, in Book "6," page 613.
(Signed) E. J. CRAWFORD, *Clerk.*

(*Note J. N. Webb to National Bank of Athens.*

Due Sep. 3. ATHENS, GA., July 6th, 1912.
$12,000.00.
$160.00 Int.

Sixty days after date I promise to pay to the order of National Bank of Athens, Twelve Thousand & 00/100 Dollars, at the National Bank of Athens, Ga., for value received, with interest from date, at the rate of eight per cent. per annum until paid. Secured by deed to house and lot c Price Avenue.

And we, whether maker, endorser or surety, do hereby each and severally waive and renounce for ourselves, and families, all right to homestead and exemption of personalty that we may have under the Constitution and laws of the State, or of the United States, as against this note and any renewal thereof. And we agree to pay all costs of collecting the same, including ten per cent. of principal and interest as attorney's fees, should we, or either of us, fail to pay this note on or before the return day of the Court to which suit will be brought for the collection of the same, after the holder of this note, his agent or attorney has notified me in writing ten days
55 before suit is brought of his intention to bring suit, and of the Court and term of the Court to which suit will be brought.

Witness my hand and seal.

(Signed) J. N. WEBB. [L. S.]

No. —

(Deed from Webb & Crawford Co. to National Bank of Athens.)

GEORGIA,
Clarke County:

This indenture made and entered into this Sept. 12th, 1911, between the Webb & Crawford Company, a corporation of said County, and J. N. Webb, E. H. Youngkin, Edward Bancroft and Robert J. Hancock, all of said County and the stockholders in said corporation, parties of the first part, and the National Bank of Athens, party of the second part.

Witnesseth, that the said Webb & Crawford Company and the said J. N. Webb, E. H. Youngkin, Edward Bancroft and Robert J. Hancock, for and in consideration of the sum of Thirty Thousand ($30,000) Dollars, in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, convey and confirm unto the said National Bank of Athens and its assigns, the following described property, situate, lying and being in the City of Athens, to-wit: The Webb & Crawford Company's new store and warehouse building and the real estate upon which it is built, fronting north on Fulton street—a distance of 65 feet, more or less, and the brick portion of said building running back a distance of one hundred feet, more or less, and the wooden portion of said building, covered with sheet iron, in rear of but connected with the brick portion, having a width of 30 feet, more or less, and running back a distance of 120 feet, more or less, said property being bounded on the east by street extension along which run the terminal tracks of the Central Railway, and on the south by — and on the west by —. To have and to hold the said described property with all and singular, the rights, and appurtenances thereunto belonging, to the only proper use, benefit and behoof of the said National Bank of Athens, its successors and assigns in fee
56 simple—and the said parties of the first part, the said bargained lot or parcel of land, with all its improvements, unto the said National Bank of Athens, and its assigns, against the parties of the first part, their heirs, executors, administrators and against all and every other person or persons shall and will warrant and defend by virtue of these presents—

In witness whereof the said Webb & Crawford Company and the said J. N. Webb, E. H. Youngkin, Edward Bancroft and R. J. Hancock have hereunto set their hands and seals and delivered these presents the year and day first above written.

(Signed) WEBB & CRAWFORD CO.,
Per J. N. WEBB, [L. S.]
President, AND
E. BANCROFT, *Secretary.*
J. N. WEBB. [L. S.]
E. H. YOUNGKIN. [L. S.]
E. BANCROFT. [L. S.]
R. J. HANCOCK. [L. S.]

Signed, sealed and delivered in the presence of:

(Signed) J. M. HOWELL,
N. P., Clarke Co., Ga.
A. W. WEIR.

Clerk's Office, Superior Court, Clarke County, Georgia.

Filed for record at 12:05 o'clock P. M., this 14 day of Aug., 1912, and recorded in Book 11, folio 518, this 15 day of Aug. 1912.

(Signed) E. J. CRAWFORD,
Clerk S. C. C. Ga.

National Bank of Athens.

Due Aug. 27. ATHENS, GA., July 28th, 1912.
$10,000.00.

Thirty days after date we promise to pay to the order of National Bank of Athens, Ten Thousand and no/100 Dollars, at the National Bank of Athens, Ga., for value received, with interest from
57 maturity at the rate of eight per cent. per annum until paid. Secured by 365 shares stock Webb & Crawford Co., attached to this note.

And we, whether maker, endorser, or surety, do hereby each and severally waive and renounce for ourselves and families all right to homestead and exemption of personalty that we may have under the Constitution and laws of this State, or of the United States, as against this note and any renewal thereof. And we agree to pay all costs of collecting the same, including ten per cent. of principal and interest as attorney's fees, should we, or either of us, fail to pay this note on or before the return day of the Court to which suit will be brought for the collection of the same, after the holder of this note, his agent or attorney has notified us in writing ten days before suit is brought of his intention to bring suit, and of the Court and term of the Court to which suit will be brought.

Witness my hand and seal.

(Signed) WEBB & CRAWFORD CO.,
By J. N. WEBB, *Pres.* [L. S.]

No. —.

(Indorsements on back:) (Signed) J. N. Webb.

In the Matter of WEBB & CRAWFORD CO., Bankrupt.

At Athens, in said district, on the 10th day of April, 1913.

Ordered that the within note allowed withdrawn, copy left in lieu thereof.

(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

National Bank of Athens.

Due Aug. 25.
$3,100.00.

ATHENS, GA., July 26th, 1912.

Thirty days after date we promise to pay to the order of National Bank of Athens Thirty-One Hundred and no/100 Dollars at the National Bank of Athens, Ga., for value received, with in-
58 terest from maturity at the rate of eight per cent. per annum until paid.

And we, whether maker, endorser, or surety, do hereby each and severally waive and renounce for ourselves and families all right to homestead and exemption of personalty that we may have under the Constitution and laws of this State, or of the United States, as against this note and any renewal thereof. And we agree to pay all costs of collecting the same, including ten per cent. of principal and interest as attorney's fees, should we, or either of us, fail to pay this note on or before the return day of the Court to which suit will be brought for the collection of the same, after the holder of this note, his agent or attorney has notified us in writing ten days before suit is brought of his intention to bring suit, and of the Court and term of the Court to which suit will be brought.

Witness my hand and seal.

WEBB & CRAWFORD CO.,
Per J. N. WEBB, *Pres.* [L. S.]

No. —.

(Indorsements on back:) (Signed) J. N. Webb.

In the Matter of WEBB & CRAWFORD CO., Bankrupt.

At Athens, in said district, on the 10th day of April, 1913.

Ordered that the within note allowed withdrawn, copy left in lieu thereof.

(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

National Bank of Athens.

Due Aug. 25th.
$10,000.00.

ATHENS, GA., July 26th, 1912.

Thirty days after date we promise to pay to the order of National Bank of Athens Ten Thousand and no/100 Dollars, at the National Bank of Athens, Ga., for value received, with interest from maturity at the rate of eight per cent. per annum until paid.

59 And we, whether maker, endorser, or surety, do hereby each and severally waive and renounce for ourselves and families all right to homestead and exemption of personalty that we may have under the Constitution and laws of this State, or of the United States, as against this note and any renewal thereof. And we agree to pay all costs of collecting the same, including ten per cent. of

principal and interest as attorney's fees, should we, or either of us, fail to pay this note on or before the return day of the Court to which suit will be brought for the collection of the same, after the holder of this note, his agent or attorney has notified us in writing ten days before suit is brought of his intention to bring suit, and of the Court and term of the Court to which suit will be brought.

Witness my hand and seal.

WEBB & CRAWFORD CO.,
By J. N. WEBB, *Pres.* [L. S.]

No. —.

(Indorsements on back:) (Signed) J. N. Webb.

In the Matter of WEBB & CRAWFORD Co., Bankrupt.

At Athens, in said district, on the 10th day of April, 1913.

Ordered that the within note allowed withdrawn, copy left in lieu thereof.

(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

(*Security Deed.*)

J. N. Webb
to
Jack F. Jackson.

GEORGIA,
Clarke County:

This indenture, made and entered into this the 14th day of August, 1912, between J. N. Webb of the County of Clarke and State of Georgia, party of the first part, and Jack F. Jackson of the County of Clarke and State of Georgia, party of the second part,

60 Witnesseth: That the said party of the first part, for and in consideration of the sum of Five ($5.00), cash in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and other valuable and sufficient consideration, has granted, sold and conveyed, and by these presents does grant, sell and convey unto the said party of the second part, his heirs and assigns, all of the following described property, to-wit:

All that tract or parcel of land, situate, lying and being in the City of Athens, County of Clarke, State of Georgia, and on the north side of Prince Avenue in said city, fronting ninety (90) feet on said Prince Avenue and running back in a northward direction three hundred (300) feet on Pope street, and being bounded as follows: On the north side by lot of G. W. McDorman, on the east by Pope street, on the south by Prince Avenue and on the west by lot of Mrs. W. D. Beacham, the lot hereby conveyed being the lot upon which the said J. N. Webb now resides.

To have and to hold the said bargained property, with all and singular the rights, members and appurtenances thereunto appertaining to the only proper use, benefit and behoof of the said party

of the second part, his heirs and assigns, in fee simple forever; and the said party of the first part the said described property to the said party of the second part. his heirs, executors, administrators and assigns against the said party of the first part, his heirs, executors and administrators and against all and every other person or persons, shall and will warrant and forever defend the right and title thereto, by virtue of these presents.

This conveyance is made under Sections 3306 et seq. and 6037 of the Code of Georgia of 1910 to secure the following debts of the party of the first part to the party of the second part, to-wit:

1. A promissory note bearing date on its face of February 4th, 1912, for the principal sum of Five Hundred ($500.00) Dollars, due January 15th, after date, payable at the National Bank of Athens, Georgia, with interest from maturity at the rate of 8% annually until paid, waiving homestead and providing for the payment of 10% attorney's fees, in accordance with law, said note being under seal and signed by J. N. Webb and payable to Jack F. Jack-
61 son, said note was executed on January the 4th, 1912, and by mistake the date of said note was made February 4th, 1912.

2. On August 10th, 1912, the Webb & Crawford Company executed and delivered to the Georgia National Bank its notes for Five Thousand ($5,000.00) Dollars, principal due at ninety days, with interest from maturity at 8% upon said note. Jack F. Jackson is an indorser or surety. This deed is made to secure any liability that may be imposed upon the said Jack F. Jackson as surety or indorser on said note, and to hold Jack F. Jackson harmless from all damages and costs whatsoever that may result to him on account of his being indorser or surety on said note.

This deed is made subject to a deed made by the said J. N. Webb to the National Bank of Athens, Georgia, to secure an indebtedness of Twelve Thousand ($12,000.00) Dollars.

It is hereby expressly agreed that the party of the second part may enforce the payment of the debt hereby secured, or either of them, by selling at public outcry before the court house door in said County, to the highest bidder for cash, all of the interest of the party of the first part conveyed in this deed, after advertising the time, place and terms of sale in the newspaper in which the sheriff of Clarke County advertises his sales once a week for four weeks, without regard to the number of days.

The said party of the second part, his agent or legal representative, may make to the purchaser or purchasers of said property good and sufficient titles in fee simple to the same, thereby divesting out of the said party of the first part all right and equity that he may have in and to said property, and vest the same in the purchaser or purchasers as aforesaid, the proceeds of said sale are to be applied first to the payment of said debt and the expenses of the proceedings as aforsaid, and all taxes that may be due on said property, and the remainder, if any, to the said party of the first part. And the said party of the second part, his agent or legal representative shall be authorized summarily to put the purchaser or purchasers in

possession, the said party of — covenanting and agreeing to surrender the same without let or hindrance of any kind.

In order to comply with and fully carry out the intention
62 of the parties hereto, the said party of the second part, his heirs, executors, administrators or assigns are hereby expressly authorized and empowered to bid for and purchase said premises at such sale.

The power and agency aforesaid is coupled with an interest and is hereby made irrevocable, even by death.

But this method of realizing on said property shall only be cumulative of other remedies allowed the said party of the second part, under the laws of this State, which may be used at the option of the said party of the second part.

In witness whereof the said party of the first part has hereunto set his hand and affixed his seal, and delivered these presents the day and year first above written.

J. N. WEBB. [L. S.]

Signed, sealed and delivered in presence of:

V. V. RADER,
J. M. HOWELL,
Notary Public, Clarke County.

[N. P. SEAL.]

Filed at 5:30 P. M., August 14th, 1912. Recorded August 15th, 1912, in Book 11, folio 519.

ELMER J. CRAWFORD,
Clerk Supr. Court, Clarke Co., Ga.

(*Involuntary Petition in Bankruptcy.*)

To the Honorable W. T. Newman, Judge of the District Court of the United States for the Northern District of Georgia, Eastern Division:

The petition of John Gerdine, Mrs. W. P. Brooks and Mrs. A. W. Hall, all of Athens, Georgia, respectfully shows:

That Jos. N. Webb of the City of Athens, in said District of Georgia, has for the greater portion of the six months next preceding the date of the filing of this petition had his principal place of business and resided at the City of Athens, in the County of Clarke, and in said District of Georgia, and is by occupation a merchant.

63 That he, said Jos. N. Webb, owes debts to the amount of One Thousand ($1,000.00) Dollars and over and is insolvent, and is neither a wage earner nor a person engaged principally in farming or the tillage of the soil.

That your petitioners are creditors of the said Jos. N. Webb, having provable claims against him, which amount in the aggregate to $500.00 and over, and said claims are unsecured.

That the nature and amount of your petitioners' claims are as follows:

John Gerdine, a note for $300.00; credit $15.00.

Mrs. W. P. Brooks, note for $1,000.00.

Mrs. A. W. Hall, note for $500.00.

That within four months preceding the filing of this petition the said Jos. N. Webb, while insolvent, committed an act of bankruptcy by a transfer of a portion of his property by the payment of money, in the sum of $700.00, to A. H. O'Farrell, with the intent to prefer said creditor over his other creditors, and did within said period of time likewise prefer by the payment of money, to-wit: by payment of $50.00 to Michael Bros. and by the payment of $14.00 to Davison-Nicholson Co., with intent to prefer said creditors over his other creditors, commit additional acts of bankruptcy.

Wherefore your petitioners pray that service of this petition with a subpœna may be made upon the said Jos. N. Webb, as provided by the bankruptcy law, and that he be adjudged bankrupt within the purview of such law.

(Signed) JOHN GERDINE,
By S. C. UPSON, *Att'y.*
MRS. W. P. BROOKS,
By HOWELL C. ERWIN, *Att'y.*
MRS. A. W. HALL,
By S. C. UPSON, *Att'y.*

S. C. UPSON,
COBB & ERWIN,
Attorneys for Petitioners.

GEORGIA,
Clarke County:

H. C. Erwin and S. C. Upson, being first duly sworn on oath, say that they are attorneys for the above-named petitioners
64 and that the facts set forth in the foregoing petition are true to the best of their information, knowledge and belief.

(Signed) HOWELL C. ERWIN.
S. C. UPSON.

Subscribed and sworn to before me this 14th day of August A. D. 1912.

(Signed) W. G. CORNETT,
U. S. Com'r.

(*Acknowledgment of Service.*)

Due and legal service of the within creditors' petition and a subpœna acknowledged. Duplicate petition and subpœna received. Further service and notice waived.

(Signed) E. K. LUMPKIN,
Att'y for Jos. N. Webb.

Aug. 15, 1912.

(*Filing.*)

Filed in Clerk's office 9:15 P. M. Aug. 14, 1912.
(Signed) O. C. FULLER, *Clerk*,
By W. G. CORNETT,
Deputy Clerk.

(*Order of Reference in Judge's Absence.*)

In the District Court of the United States, Eastern Division, for the Northern District of Georgia. In Bankruptcy.

In the Matter of JOSEPH N. WEBB.

Whereas, on the 14th day of August, A. D. 1912, a petition was filed to have Joseph N. Webb of Athens, in the County of Clarke and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and

Whereas, the Judge of said Court was absent from said division of said district on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or his creditors, it is thereupon ordered that the said matter be referred to Hon. F. L. Upson, one of the Referees in Bankruptcy of this Court, to consider said petition and take such proceedings therein as are required by said acts; and that the said
65 Joseph N. Webb shall attend before said Referee on the day ordered by said Referee.

Witness my hand and the seal of the said Court, at Athens, Ga., in said district, on the 31st day of August, A. D. 1912.

[Seal of the Court.]

(Signed) O. C. FULLER, *Clerk*,
By W. G. CORNETT,
Deputy Clerk.

(*Filing.*)

Filed in Clerk's office 10 A. M., Aug. 31, 1912.
(Signed) O. C. FULLER, *Clerk*,
By W. G. CORNETT,
Deputy Clerk.

In the District Court of the United States for the Northern District of Georgia, Eastern Division. In Bankruptcy.

No. 318.

In the Matter of JOSEPH N. WEBB, Bankrupt.

At Athens, Georgia, in said district, on the 31st day of August, A. D. 1912, before the Honorable Frank L. Upson, as Referee in

Bankruptcy of said Court in Bankruptcy, the petition of John Gerdine et al. that Joseph N. Webb be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, by virtue of an order of reference in Judge's absence from the Eastern Division of said district, having been heard and duly considered, the said Joseph N. Webb is hereby declared and adjudged bankrupt accordingly.

Witness my official signature as referee in bankruptcy of said Court, and the seal thereof, at Athens in said District, on the 31st day of August, A. D. 1912.

[Seal of the Court.]

(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

(In absence of Hon. Wm. T. Newman.)

(*Filing.*)

Filed in Referee's office, 31 day of Aug., 1913, 10 A. M.
(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

66 (*Petition for Receiver and Rule Nisi.*)

In the District Court of the United States for the Northern District of Georgia, Eastern Division. In Bankruptcy.

In the Matter of Jos. N. WEBB, Bankrupt, Alleged.

To Hon. F. L. Upson, Referee in Bankruptcy:

The petition of John Gerdine, Mrs. W. P. Brooks and Mrs. A. W. Hall, all of Athens, said district, respectfully shows:

That attached hereto is the certificate of the clerk that the Judge is now absent from the district.

That they have this day filed in said District Court their creditors' petition to have said J. N. Webb adjudged bankrupt, and it will be some time before said matter can come on for a hearing and decision. That in the meantime the property of said alleged bankrupt, consisting of personalty and realty, should be placed in charge of some discreet person as receiver, so that it can be correctly inventoried, insured, cared for and preserved until said involuntary bankruptcy matter is heard and decided, and it is absolutely necessary in the interest of the creditors that said receiver be appointed.

Wherefore, the premises considered, it is prayed that an order be made hereon requiring said Jos. N. Webb to show cause at such time and place as may be named, why a receiver should not be appointed as herein prayed. And they will ever pray.

(Signed) HOWELL C. ERWIN.
S. C. UPSON.

Subscribed and sworn to before me this 14th day of August, A. D. 1912.

(Signed) W. G. CORNETT,
U. S. Com'r.

As a Court of Bankruptcy, at Athens, in said District of Georgia, on This 14th Day of August, A. D. 1912.

Upon consideration of the facts as set forth in the foregoing petition it is ordered that said J. N. Webb show cause before
67 me at my office in Athens, Georgia, on the 16th day of August, A. D. 1912, at 10 A. M., why the prayers of petitioner should not be granted, provided a bond is tendered as required by Section 3, *e.* of the bankrupt act. Let service of this order and petition be made on alleged bankrupt at least 24 hours before time is fixed for hearing.

No notice of order given to creditors, none required by law.

(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

(*Filing.*)

Filed in Clerk's office, 9:15 P. M., Aug. 14, 1912.

(Signed) O. C. FULLER, *Clerk,*
By W. G. CORNETT,
Deputy Clerk.

(*Order Appointing Custodian.*)

As a Court of Bankruptcy held at Athens, in said District of Georgia, on this, the 16th day of August, 1912, this being the time and place fixed by show cause order issued on the petition of John Gerdine et al., for the appointment of receiver, there being present E. K. Lumpkin, attorney for Jos. N. Webb, alleged bankrupt; Max Michael, Esq.; F. C. Shackelford, Esq., and S. C. Upson, Esq., attorney for parties at interest. All response being made by the defendant to the rule in which it is issued and consent is given for the appointment of a custodian to take charge of the property and make an inventory of same and cover same with insurance and to care for and preserve the same, and it appearing from a statement of the facts and circumstances of the subject matter that it is absolutely necessary that the property be put in charge of some proper and discreet person for a limited period of 20 days, as custodian, and petitioners having tendered a creditors' bond under Section 3-*e* of the bankrupt law, and said bond having been approved by me, it is therefore ordered that F. C. Shackelford of Athens, Ga., be and he is hereby appointed custodian for all of the money, property and effects of the said Jos. N. Webb, alleged bankrupt.

68 Let said receiver qualify by giving bond in the sum of One Thousand Dollars, with security to be approved by me, and upon taking charge of the property let him carefully make an inventory of same, secure insurance protection for same, have same appraised and hold same in his charge for a period of 20 days, unless otherwise ordered by the Court.

Let said receiver make a full report of his actings and doings herein under and any funds coming into his hands let him deposit in one of the designated depositories of this district.

(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

(*Filing.*)

Filed in Clerk's office, Aug. 16, 1912, 5:40 P. M.

(Signed) O. C. FULLER, *Clerk,*
By W. G. CORNETT,
Dep. Clk.

Custodian's bond for $1,000.00 approved by Referee and filed in Clerk's office, 5:40 P. M., Aug. 16, 1913.

(Signed) O. C. FULLER, *Clerk,*
By W. G. CORNETT,
Dep. Clk.

69 (*Referee's Certificate.*)

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

In the Matter of WEBB & CRAWFORD Co., Bankrupt.

In Bankruptcy. No. 317.

I, Frank L. Upson, Referee in Bankruptcy, before whom the above stated matter is now pending by order of reference, do hereby certify that I find after an examination of the records of the case on file in my office the following:

Debtors' schedules show secured creditors.....	$27,600.00
Unsecured	197,681.00
The proven claims, as shown by attached list, amount to	169,767.62
The Trustee has sold the stock of groceries, store fixtures notes and accounts, realizing therefor the sum of....	25,212.68
There remains to be sold of this bankrupt's real estate the store and warehouse and other property, leasehold interest, which is appraised at.....	19,750.00
On this property the Nat. Bank of Athens claims a lien of	23,100.00

And to secure discounted paper, indorsed by bankrupt.

A dividend of 10% and a second dividend of 5% has been declared and paid out of the funds of this estate.

Dated at Athens, this 11th day of July, A. D. 1913.

(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

70 *List of Proved Claims in Webb & Crawford Bankruptcy Case.*

J. N. Webb, Indorser.

Name creditor.	Dates.	Amount.
Ruge Bros. Canning Co.	July, 1912	$160.00
American Tob. Co.	6-12	8.14
Castleman Blackmore Co.	6-12	597.52
C. B. Daniels	7-10	200.00
Mrs. W. B. Bowden	2-10	160.00
N. W. Yeast Co.	...	12.66
Bradstreet Co.	-12	30.00
Laur & Suter	-12	124.22
Walker & Wilbur, trans.	-12	4,002.41
Peaslee-Gaulbert Co.	-12	904.24
Liggett & Myers Tob. Co.	-12	271.79
Bedrock Co.	-12	21.32
Baldwin State Bank	-12	7,325.27
T. J. Shackelford, Trustee	...	251.62
Southern Refining Co.	...	253.40
R. T. Rayle	...	100.00
Ogburn-Hill & Co.	-12	1,904.42
V. A. Baking Powder	...	15.76
Braid-Dunwoody Mill Co.	...	276.00
R. F. Miller	Oct. '09	1,476.00
Blackwell Tob. Co.	...	322.26
Rowland Co.	-12	671.77
Cudahy Packing Co.	-12	160.00
W. T. Alexander	Nov. '09	1,588.00
American Sugar Co.	-12	2,013.03
Salary	...	12.28
Old Dom. S. Co.	...	8.40
Griffeith-Durney Co.	...	116.25
Cen. Ga. Ry. Co.	...	1,639.29
Mrs. J. C. Hunter	June '06	1,248.00
W. Rigley Co.	...	82.48
Mrs. Gerdine, $1,440.67	Aug. '03	1,440.67
Miss Gerdine	...	1,109.67
Mrs. E. J. Hunter	1-11	1,000.00
Mrs. M. D. Browning	2-11	1,800.00
71 Tenn. Pack. Y'rds	12	9,664.80
Can. Camp Products Co.	...	1,200.00
R. A. Patterson Tob. Co.	...	69.00
Cinciola Bros.	...	52.20

Christian Pepper Tob. Co.	...	31.95
Klein & Martin	...	7.75
Bon Ami Co.	...	45.00
Fels-Naptha Co.	...	18.00
Edible Products Co.	-12	454.42
R. J. Reynolds Tob. Co.	-12	5,477.48
Diamond Match Co	-12	1,520.29
Miss Annie Carlton	Oct. '09	1,060.00
J. & S. Emison	-12	1,296.44
F. F. Dalby Co.	-12	102.58
Beechnut Pack. Co.	-12	76.03
Ulaca Bev. Co.	...	19.24
Quaker Oats Co.	-12	87.27
Atlanta Milling Co.	-12	1,873.39
Deep Rock Ginger Ale Co.	-12	5.00
W. G. Devant	...	1,815.15
Standard Vinegar Co.	...	7.20
Cobb & Erwin	...	200.00
F. M. Bohannan	-11	4,663.25
Welch Grape Juice Co.	...	18.30
T. J. Lipton	...	92.70
W. A. Higgins & Co.	...	1,406.50
J. E. Fowler	...	38.28
Morgan & Hamilton	...	62.56
Gilbert & Co.	...	226.27
Comstock & Co.	...	52.50
Coca-Cola Co.	...	663.00
Wadsworth	...	142.76
Booker Tob. Co.	...	49.25
F. E. Block Co.	...	133.09
Standard Oil Co.	...	31.82
Mrs. Bessie T. Swift	May 11	2,550.00
Indorsed by J. N. Webb.		
Athens Sav. Bank	...	9,000.00
Ga. Nat. Bank	...	26,500.00
Amer. State Bank	...	17,500.00
72 Merchants' Nat'l Bank	2-12	5,181.50
Bank of Maxeys	6-12	6,576.53
		10,653.32
R. P. Boswell	...	2,135.00
Mrs. Maggie P. Johnson	...	5,000.00
J. J. Wilkins	...	5,000.00
Pittard Banking Co.	...	105.23
J. R. Moore	...	526.00
J. R. Moore	...	400.35
C. N. Hodgson & Co.	...	449.03
C. N. Hodgson & Co.	...	530.27
Oconee County Bank	...	1,500.00
K. P. Lodge	...	1,000.00
Mrs. Ella C. Ross	...	5,000.00
Jack F. Jackson	...	6,378.50
Bank of Statham	...	

Mechanics' Bank, Logansville	...	1,229.42
J. K. Harris, lien claim	...	211.27
C. H. Grant	...	22.50
Mrs. V. V. Raider	...	25.00
Taxes	...	1,015.00
Morris & Co.	...	141.02
Swift & Co.	...	704.32
Roth Peka Co.	...	450.08
Post. Tel. Co.	...	24.40
Interstate Com. Co.	...	16.80
American Chicle Co.	...	57.36
Colgate Co.	...	237.60
Globe Soap Co.	...	176.63
N. K. Fairbanks Co.	...	51.87
Webb-Crawford Co.	...	23.04
Durham Mfg. Co.	...	35.36
Weyman-Bruton Co.	...	1,486.76
Cruden-Martin Co.	...	29.26
Valier & Spies Mill. Co.	...	835.33
R. Moore & Co.	...	86.35
Calloway Gro. Co.	...	64.75
Mrs. K. F. Lampkin	...	300.00
Morton Salt Co.	...	77.80
C. D. Hunt	...	1,101.86
73 Federal Cigar Co.	...	221.50
S. Anargyros	...	38.98
P. Lorrilard	...	100.85
Costello & Co.	...	43.50

(*Filing.*)

Filed in Clerk's office 6:00 P. M., July 11, 1913.
(Signed) O. C. FULLER, *Clerk,*
By W. G. CORNETT, *Dep. Clk.*

(*Agreement.*)

It is agreed that the within be used and considered as a part of the evidence of F. C. Shackelford, Trustee, in the case pending in the District Court of the United States, Eastern Division of the Northern District of Georgia, of F. C. Shackelford, Trustee for Jos. N. Webb, Bankrupt, vs. The National Bank of Athens.

(Signed) COBB & ERWIN,
S. C. UPSON,
HORACE M. HOLDEN,
Atty's for F. C. Shackelford, Trustee.
JNO. J. & ROY STRICKLAND,
Att'ys for National Bank of Athens.

(*Referee's Certificate.*)

In the District Court of the United States for the Northern District of Georgia, Eastern Division.

In the Matter of Jos. N. WEBB, Bankrupt.

In Bankruptcy. No. 318.

I, Frank L. Upson, Referee in Bankruptcy, before whom the above stated matter is now pending by order of reference, at the
74 request of F. C. Shackelford, trustee of said estate, do hereby certify that I find after an examination of the records of the case of file in my office the following:

Debtors' schedules show list of creditors holding security:

Mrs. A. C. Lucas, amount of debt.....	.....	14,000.00
Secured by deed to real estate on Broad street, Athens, Ga., by ¼ undivided interest in 333 acres of farm land, Clarke County, Georgia; by 10 shares of Ga. Nat. Bank stock; by 5 shares Columbia Fire Ins. Co. stock; by 1000 shares of Coca-Cola Bottling Co. of Chicago stock.		
All of the above property was sold by the trustee for	.....	$11,454.00
and all proceeds applied to said lien.		
National Bank of Athens, debt.....	.....	12,000.00
Secured by house, No. 424 Prince Ave., Athens, Ga.		
American State Bank, debt.....	.....	300.00
Secured by 2 shares said bank stock...	300	
Georgia National Bank, debt.....	.....	800.00
Secured by 7 shares said bank stock...	.....	1,400.00
W. T. Brightwell, debt.....	.....	1,000.00
Secured by 100 shares of Coca-Cola stock of Chicago, of the value of $1,000.00.		
W. C. Pitner, debt.....	.....	2,000.00
Secured by Coca-Cola, 100 shares.....	2,000.00	
75		
I. G. Swift debt	.....	2,000.00
Secured by 200 shares of Coca-Cola....	2,000.00	
Mrs. D. M. Kenney.....	.....	2,400.00
Secured by 200 shares Coca-Cola.....	2,000.00	
Mrs. A. H. O'Farrell, as indorser,		
Secured by 300 shares Coca-Cola stock of Chicago, at value of.....	2,000.00	

Mrs. S. A. Webb, debt.....	.....	6,600.00
Secured by 90 shares Eatonton Oil & Fertilizer Co., Eatonton, Ga., value....	4,000.00	
Also deed to No. 424 Prince Ave., subject to lien held by Nat. Bank of Athens. Equity valued at	2,000.00	
A. H. Hodgson.....	.....	5,000.00
Mrs. Jno. Gerdine	.....	1,333.34
Miss Susie Gerdine.....	.....	1,033.34
Mrs. S. H. Webb	.....	6,600.00
Mrs. D. M. Kenney.....	.....	3,400.00
The above five creditors, in addition to such securities held by them as above indicated in other items, have also by the transfer of the equities held by me in the real and personal property that was conveyed to Mrs. A. C. Lucas to secure her debt of $14,000.00, as fully set forth and listed in the schedules. These equities I value at.....	.....	4,000.00
Jack F. Jackson, Athens, Ga., indorser on J. J. Wilkins for $5,000.00, holds as security as such indorser a deed 76 to my house and lot, No. 424 Prince Ave., Athens, Ga., which was given him subsequent to the deed given to National Bank of Athens, Ga., as above listed.		
The list of claims proven amount to..... as shown by attached list.	.....	73,769.93
The list of unsecured creditors scheduled amount to	.....	162,140.65
There has been no dividend paid in this estate.		
Not including the pledged property, above listed, there remains to be sold by the trustee the house and lot on Prince Ave., of the schedule value of.....	.....	14,000.00
being No. 424 Prince Ave., and the particular property on which the National Bank of Athens claims to hold a lien.		

Dated at Athens, Ga., this July 11th, A. D. 1913.

(Signed) FRANK L. UPSON,
Referee in Bankruptcy.

J. N. Webb Bankruptcy Case—Claims Proven.

Oconee County Bank, 3-12 Indv.	300.00
3-12 as End.	330.20
West. U. Tel. Co.	7.20
Mrs. Vernon Hall, 6-12	575.00
R. J. Reynolds Tob. Co.	5,000.00
Mary Lou Weir, Oct. '09	250.00
John Gerdine, July '05	300.00
T. H. Nickerson, Apr. '06	250.00
J. L. Arnold	110.00
R. F. Miller, Oct. 10	800.00
J. J. Wilkins	5,000.00
Mrs. O'Farrell	530.00
Mrs. M. P. Johnson	2,135.00
77 Amer. State Bank	17,500.00
Mrs. Bessie T. Swift, May 11	2,500.00
W. W. Duncan, Sept. 11	429.33
Athens Sav. Bank, May 12	9,000.00
Webb & Crawford Co.	2,253.50
Ga. Nat'l Bank, May 12	26,500.00
	73,769.93
Mrs. A. C. Lucas, secured claim, Sept. 11 note	6,500.00
Mrs. A. C. Lucas, secured claim, Sept. 11 note	7,500.00

List of Creditors as Shown by J. N. Webb's Schedules.

Mrs. A. C. Lucas	$14,000.00
National Bank of Athens	12,000.00
Amer. State Bank	300.00
Georgia Nat'l Bank	800.00
W. T. Brightwell	1,000.00
W. C. Pitner	2,000.00
Mrs. D. M. Kenney	2,400.00
Baldwin State Bank	1,000.00
Mrs. S. H. Webb	6,600.00
A. H. Hodgson	5,000.00
Mrs. Susan Gardine	1,333.34
Mrs. Susie Gerdine	1,033.00
Jack F. Jackson	5,000.00
Jas. M. Smith	5,000.00
C. D. Ogburn	1,000.00
Mary Lou Weir	250.00
Oconee County Bank	300.00
M. L. Branch	580.00
Jack F. Jackson	500.00
Mrs. Vernon Hall	575.00
Mrs. A. H. O'Farrell	800.00
W. P. Brooks	900.00
R. F. Miller	800.00

T. H. Nickerson	250.00
R. H. Spratling, as indorser	1,000.00
Bank of Maxeys, as indorser	500.00
W. R. McWhorter, as indorser	1,000.00
Oconee County Bank, as indorser	600.00
78 Jas. M. Smith, as indorser	4,500.00
National Bank of Athens, as indorser	23,100.00
Pittard Banking Co., as indorser	5,000.00
J. J. Wilkins, as indorser	5,000.00
Miss Ella C. Ross, as indorser	1,000.00
J. R. Moore, as indorser	500.00
Mrs. M. J. Penn, as indorser	2,200.00
Oconee County Bank, as indorser	700.00
Mrs. Lampkin, as indorser	300.00
Mrs. Johnson, as indorser	2,000.00
Amer. State Bank, as indorser	17,500.00
Ga. Nat'l Bank, as indorser	31,500.00
R. W. Wood, as indorser	2,719.31
	162,140.65

(Filing.)

Filed in clerk's office 6:00 P. M. July 11, 1913.
(Signed) O. C. FULLER, *Clerk*,
By W. G. CORNETT, *Dep. Clk.*

(Agreement.)

It is agreed that the within be used and considered as a part of the evidence of F. C. Shackelford, trustee, in the case pending in the District Court of the United States for the Northern District of Georgia, Eastern Division, of F. C. Shackelford, trustee for Jos. N. Webb, Bankrupt, vs. The National Bank of Athens. The list includes the proven debts against Webb & Crawford Co. indorsed by J. N. Webb as well as his individual debts.

(Signed) COBB & ERWIN,
S. C. UPSON,
HORACE M. HOLDEN,
Attorneys for F. C. Shackelford, Trus.
JNO. J. & R. M. STRICKLAND,
Att'ys for the National Bank of Athens.

79 UNITED STATES OF AMERICA,
Northern District of Georgia, Eastern Division:

I, Olin C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia, do hereby certify that the foregoing and attached seventy-six (76) pages of printing and writing contain a true, full, correct and complete copy of the original record, assignment of errors, and proceedings had in the case of

National Bank of Athens, Plaintiff in Error, Appellant, vs. F. C. Shackelford, Trustee for J. N. Webb, Bankrupt, Defendant in Error, Appellee, No. — remaining on record and of file in my office at Athens, Georgia, and as stipulated by counsel, except the original citation with service thereon, is included in the stead of a copy thereof.

In testimony whereof, I hereunto set my hand and the seal of said Court at Athens, Georgia, this the 9th day of August, A. D. 1913.

[SEAL.]

OLIN C. FULLER,
Clerk U. S. District Court for the Northern District of Georgia.

80 That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Motion of Appellee to Dismiss Appeal.

Filed September 24th, 1913.

October 6th, 1913.

Atlanta, Georgia.

Motion to Dismiss Appeal.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2548. In Equity.

NATIONAL BANK OF ATHENS, Plaintiff in Error and Appellant,
versus
F. C. SHACKELFORD, Trustee for J. N. Webb, Defendant in Error and Appellee.

Andrew J. Cobb, Horace M. Holden, Stephen C. Upson, Howell C. Erwin, Counsel for Appellee F. C. Shackelford, Trustee.

81 In the United States Circuit Court of Appeals for the Fifth Circuit.

In the Matter of J. N. WEBB, Bankrupt.

No. 2548.

NATIONAL BANK OF ATHENS, Appellant,
versus
F. C. SHACKELFORD, Trustee for J. N. Webb, Appellee.

ATLANTA, GEORGIA, October 6th, 1913.

Motion to Dismiss Appeal.

And now comes the Appellee, F. C. Shackelford, trustee for J. N. Webb, bankrupt, in the above entitled cause, by his Counsel appearing in that behalf, and moves the Court to dismiss the appeal in the above entitled cause, upon the following grounds:

First Ground.

Because this Court has no jurisdiction of this appeal in said cause, for the reason that said appeal was not taken and perfected within ten days after the decree and judgment appealed from had been rendered as required by section 25 of the National Bankruptcy Act of 1898, as amended, for that the petition for appeal was allowed by his Honor, W. T. Newman, Judge of the District Court below, on the 19th, day of July 1913, and the petition and the order of allowance were filed in the Clerk's office of said District Court on the 19th day of July, 1913, as is shown on page 46 of the transcript of record in this cause, and the assignment of errors and the prayer for reversal and the bond for appeal were not filed with the petition
82 for appeal on the 19th day of July 1913, the date the appeal was allowed and filed, as is shown by page 46 of the transcript of record, but the assignment of errors and prayer for reversal were filed and docketed in the Clerk's office of the District Court below on the 25th, day of July 1913, as appears by page 50 of the transcript of record, and no bond for appeal was approved or filed, and there is nothing in the transcript of record showing that a bond for appeal was given by appellant, and there is no entry in the transcript of record that any citation was issued and filed in the District Court below, and there is no entry in the transcript of record that there was any order made by the Judge of the District Court below enlarging the time to perfect the appeal, and none was filed in the Clerk's office of said Court.

Second Ground.

And because said appeal is informal, irregular and insufficient, for the reason that no assignment of errors was filed by the appellant

with the Clerk of the District Court below with his petition for appeal, as required by Rule xi of the Circuit Court of Appeals for the Fifth Circuit, and as required by Section 997 of the Revised Statutes, (U. S. Comp. St. 1901, p. 712)—

Rule xi being in part as follows:

"Assignment of Errors."

"The plaintiff in error or appellant shall file with the Clerk of the Court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed."

Because the petition for appeal was filed and allowed on the 19th day of July, 1913, [the order of its allowance being without any condition] as is shown on page 46 of the transcript of record, and the assignment of errors was not filed in the Clerk's office until the 25th day of July, 1913, as is shown on page 50 of the transcript of record, which was seven days after the appeal had been allowed and filed.

83 Third Ground.

Because appellant failed and neglected to properly authenticate the paper or report or stenographic transcript of the evidence claimed by appellant to have been delivered by witnesses at the hearing and taken orally in open court under Rule 46 of Rules of Practice for the Courts of Equity of the United States and Section 21*a*, of the Bankruptcy Act and did fail and neglect by a bill of exceptions or its equivalent, to make this alleged testimony a part of the record to be transmitted in the transcript of record, as will appear by an examination of the transcript of record, wherein no entries are to be found showing that such was done in the Court below.

Fourth Ground.

Because appellant has included in the transcript of record, the evidence claimed by appellant to have been delivered by witnesses upon the trial, in full, in the form of questions and answers, and has not stated the evidence in simple and condensed form, omitting all parts not essential to the decision of the questions presented by this appeal, and has not stated the testimony of witnesses in narrative form, nor did the Court or Judge direct any part of the testimony to be reproduced in exact words of witnesses, as is shown by pages 20 to 39, inclusive, of the transcript of record, wherein appears the testimony of several witnesses in the form of questions and answers, relative to the value of the property involved, when the decision of the questions presented by the appeal do not relate to the question of the value of the property, and said appellant did not as required by paragraph (*b*) of Rule 75 of said rules of practice for courts of equity condense and state the evidence and prepare and lodge his statement thereof in the Clerk's office of the Court below for the

examination of the other parties at or before the time of filing his præcipe under paragraph (a) of said Rule 75, as will appear from an examination of the pages of the said transcript of record, wherein no entries of such compliance on the part of appellant in the Court below are shown, nor was the statement of evidence, nor was the evidence as it appears on pages 20 to 39 of the transcript of the record, approved by the Judge as required by said Rule 75
84 above referred to.

Fifth Ground.

And appellee moves the Court to dismiss the appeal on the above stated grounds, and for other reasons apparent upon the face of said papers.

(Signed) ANDREW J. COBB,
HORACE M. HOLDEN,
STEPHEN C. UPSON,
HOWELL C. ERWIN,
Counsel for Appellee F. C. Shackelford, Trustee for J. N. Webb, Bankrupt.

85 In the United States Circuit Court of Appeals for the Fifth *District.*

To Messrs. Jno. J. & Roy M. Strickland, Counsel for Appellant:

Please take notice that on the 6th day of October, A. D. 1913, at Atlanta, Georgia, on the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the United States Circuit Court of Appeals, for the Fifth Circuit, for the decision of the Court thereon, and we shall then and there move said Court for an order dismissing the appeal on the grounds and for the reasons therein stated, and for other reasons which are apparent upon the face of said papers, and we shall then and there move for such other and further relief in the premises as may be justice.

Annexed hereto, is a copy of said motion, and also a copy of the brief argument to be submitted with the said motion in support thereof.

(Signed) ANDREW J. COBB,
HORACE M. HOLDEN,
STEPHEN C. UPSON,
HOWELL C. ERWIN,
Counsel for Appellee for the Purpose of the Motions.

Service of foregoing notice and brief acknowledged, copies of motions and brief above referred to received.

Dated at Athens, Georgia, on this, 22nd day of September, A. D. 1913.

JNO. J. & ROY M. STRICKLAND,
Counsel for Appellant in Above Matter.

86 *Motion of Appellee to Dismiss Appeal and to Affirm Decree.*

Filed October 2nd, 1913.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2548.

NATIONAL BANK OF ATHENS, Appellant,
versus
F. C. SHACKLEFORD, Trustee in Bankruptcy for J. N. Webb, Appellee.

Appeal from the District Court of the United States for the Northern District of Georgia.

Appellee's Motion to Dismiss Appeal and to Affirm Decree.

I.

And now comes appellee herein by his counsel appearing in that behalf, and moves the Court to dismiss the appeal in the above entitled cause for want of jurisdiction and because appellant failed to file with the Clerk of the Court below with his petition for appeal, an assignment of errors which set out separately and particularly each error asserted and intended to be urged, in accordance with Rule XI of the United States Circuit Court of Appeals for the Fifth Circuit, for that the assignment of errors as contained on pages 47, 48, 49 and 50 on the transcript of record does not set out separately an- particularly errors that are in the decree, as the said decree does not hold in effect as therein urged as error, and said assignments are predicated on matters outside of the decree and the record of this appeal and appellee moves that on that ground they be stricken from the record and disregarded, the said decree appealed from being as shown by page 44 of the record, as follows:

87 (*Decree.*)

"In the District Court of the United States for the Northern District of Georgia, Eastern Division.

No. —. In Equity.

"F. C. SHACKLEFORD, as Trustee in Bankruptcy of J. N. Webb, Complainant,
vs.
NATIONAL BANK OF ATHENS, Defendant.

"After argument had upon the final hearing in this case and upon consideration thereof, it is ordered, adjudged and decreed, as follows:

"1st. That the suit of the National Bank of Athens against J. N. Webb, now pending in the City Court of Athens, referred to in the pleadings, be and the same is hereby enjoined.

2nd. That the deed held by the National Bank of Athens be and the same is hereby decreed void as against general creditors for the reasons stated in the opinion filed in this case July 17th, 1913.

"3rd. That the property involved in this litigation, to-wit, the house and lot described, be administered by F. C. Shackelford, trustee, free from the claim of lien of the National Bank of Athens.

"4th. That F. C. Shackelford, trustee, recover from the National Bank of Athens $— cost of this proceeding.

"This 19th day of July, 1913.

"(Signed) WM. T. NEWMAN,
U. S. Judge.

"(*Filing.*)

"Filed in clerk's office 2:00 P. M. July 19, 1913.

"(Signed) O. C. FULLER, *Cl'k,*
"By W. G. CORNETT, *Dep. Cl'k.*"

And the opinion of the Court, being in part as follows:

"Under any view of the facts, assuming the testimony of Captain White to be true, and leaving out of view entirely the testimony of Webb, it seems clear that this instrument would be void and ineffective as against Jackson. He assumed the liability as indorser on the Webb & Crawford paper because he found no incumbrances against them, and says expressly that he would not have indorsed for them if he had found these incumbrances. It seems to me there is no law and no authorities anywhere under which the mortgage could be enforced against Jackson.

"If it is invalid as to Jackson, then, under the decision of the Circuit Court of Appeals for this Circuit, in re Dugan, 183 Fed. 405, it would be void as to all the creditors. Other authorities might be cited, but I think the rule in the Dugan case must control as it was rendered by the Circuit Court of Appeals for this circuit.

88 "Having this view of the case, it is unnecessary to consider any of the other interesting questions discussed by counsel at the bar and in the briefs submitted by them.

"Counsel have apparently agreed to submit the matter on its merits, judging by their statement in open court and in their briefs, as to the validity of this mortgage and its effect as a prior lien. There is an amendment to the bill which is sufficient so far as the allegations go, but what the bill seems to lack is a prayer or prayers for the relief indicated by the amendment. There is a general prayer for relief attached to the original bill.

"The National Bank of Athens, so far as I can see, must stand

as a general creditor of the bankrupt estate. The trustee is entitled to a decree carrying into effect what is stated above.

"This 17th day of July, 1913.

"(Signed) WM. T. NEWMAN,
U. S. Judge.

(*"Filing.*)

"Filed in Clerk's office 4:00 P. M. July 17, 1913.

"(Signed) O. C. FULLER, *Clerk,*
"By F. L. BEERS, *Deputy.*"

And the assignment of errors, pages 47, 48, 49 and 50 of the record, being as follows:

I.

"Because the said District Court erred in holding and ruling that a deed executed under the laws of Georgia to secure a debt created at the time of the execution of the de-d, and mor- than four (4) months prior to bankruptcy was invalid under the bankrupt law as to other creditors.

II.

"Because the said District Court erred in holding and ruling that a deed executed to secure a debt created at the time of its execution must be recorded more than four (4) months before bankruptcy in order to be valid as against the Trustee for other creditors.

III.

"Because the said District Court erred in holding and ruling in effect that the deed given to the National Bank of Athens in the record was void as to all other creditors, because recorded more than four (4) months before bankruptcy whether creditors had liens or not.

IV.

"Because the said District Court erred in holding and ruling in effect that the Trustee when appointed took as a judgment creditor as of the date when petition for bankruptcy was filed; and
89 further holding that such Trustee would get a superior lien to an unrecorded deed created by contract; and in thus holding that a lien created by law, under the recording statute of Georgia, would be superior to a lien created by contract and under said statute could contest with such lien by contract.

V.

"Because the said District Court erred in holding and ruling in effect that a deed executed to secure a present debt under the recording law of Georgia is void as against a judgment obtained by law unless such deed is recorded.

VI.

"Because the said District Court erred in holding and ruling in effect that the recording statutes of Georgia would render a deed void if unrecorded as against a Trustee in bankruptcy.

VII.

"Because the said District Court erred in holding and ruling in effect that the deed made to the National Bank of Athens, though filed for record at noon before the petition in bankruptcy was filed at 9 o'clock thereafter on the same day was void. The statutes of Georgia provides that the day and hour a paper is filed shall be entered thereon and the deed in question filed for record by 12 o'clock noon became a perfect lien as against an application in bankruptcy filed at 9 o'clock the night of the same day, and the Court erred in not so ruling.

VIII.

"Because the said District Court erred in holding in effect that the bank's deed was void as against J. F. Jackson, who had signed a note for the Webb & Crawford Company as security with J. N. Webb. He not in any sense being a creditor, nor having obtained any liens by contract on the property conveyed by the bank's deed.

IX.

"Because the said District Court erred in holding in effect that J. F. Jackson, who took a deed second to and recognizing the bank's deed from J. N. Webb was not estopped to attach the deed recited in his deed.

X.

"Because the said District Court erred in granting a decree that the property covered by the National Bank of Athens' deed should be sold freed from said deed, and thus holding said deed constituted a preference under the bankruptcy law and was void.

90

XI.

"Because the said District Court erred in not holding and ruling that the National Bank's deed was a valid subs*titu*ting lien as against the Trustee and all others, and in not decreeing that the property should be sold and the bank's debt, including principal, interest, and attorney's fees paid.

XII.

"Because the said District Court erred in enjoining the suit of the National Bank of Athens against J. N. Webb, and in decreeing that the bank should pay the cost in this case."

2.

And because said 12 assignments of error do not state separately and particularly each error asserted and intended to be urged as required by Rule XI but are in effect only a statement that the Court erred in deciding the case for the wrong party.

3.

And appellee moves the Court to disregard the 12 specifications of error contained on pages 2, 3, and 4 of appellant's brief, said specifications being a verbatim copy of the 12 assignments of error above set forth, for the reason that the specifications do not set out separately and particularly each error asserted and intended to be urged and do not state how the decree appealed from is erroneous, as required by Rule XXIV of the Fifth Circuit Court of Appeals, as the decree does not hold in words or effect as is stated and urged in said specifications, and the errors so relied on can not be said to be based on said decree.

4.

And said specifications should be stricken and disregarded, because appellant's counsel in his brief of argument, fails entirely to point out the specific grounds of error relied on, nor does the argument refer to the specifications of error by number or by citation, nor does the brief attempt to argue the specifications in any manner, nor does the brief of argument in any manner comply with Rule XXIV of the Fifth Circuit Court of Appeals by exhibiting a clear statement of the points of law and facts to be discussed with a reference to the pages of the record and
91 authorities relied upon in support of each point, as urged in the specifications of error, and for failure to do so, each specification not referred to should be deemed waived and abandoned.

5.

And appellee moves the Court to strike the assignments and specifications of error on above stated grounds, and that the appeal be dismissed and that the decree of the Court below be affirmed.

(Signed) ANDREW J. COBB,
HORACE M. HOLDEN,
STEPHEN C. UPSON,
HOWELL C. ERWIN,
Counsel for Appellee,
Counsel for Appellee F. C. Shackelford, Trustee for J. N. Webb.

Motion of Appellant to Amend Record.

Filed October 6th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2548.

NATIONAL BANK OF ATHENS, Appellant,
vs.
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb, Appellee.

Appealed from the District Court of the United States for the Northern District of Georgia.

Now comes the National Bank of Athens and moves the Court to correct the record in this case in the following particulars:
92 The petition for appeal and the order allowing the appeal, and the order for bond and the citation are all, as appears from the record, marked filed on July 19th, whereas in fact they were filed on July 25th, as appears from the affidavit of W. G. Cornett, Deputy Clerk, here to the Court shown, and movant asks to correct the record so as to show these papers as having been filed on July 25th.

The National Bank of Athens moves further to amend the record by adding to the record first, the stipulation as to record on appeal, second, the citation and service, third the bond. These papers, by error, were omitted from the original record, but have been printed separately, as appears from the affidavit of W. G. Cornett, and movant asks to amend the record by adding this printed addition.

This 6th day of October, 1913.

(Signed) JNO. J. STRICKLAND,
Att'y for Nat. Bank of Athens.

93 *Additional Transcript of Record.*

Filed October 6th, 1913.

94 2548.

Additional Transcript of Record.

In the United States Circuit Court of Appeals for the Fifth Circuit.

In Bankruptcy.

In the Matter of J. N. WEBB, Bankrupt.

In Equity.

NATIONAL BANK OF ATHENS, Plaintiff in Error and Appellant,
versus
F. C. SHACKELFORD, Trustee for J. N. Webb, Defendant in Error and Appellee.

Jno. J. and Roy M. Strickland, Attorneys for Appellant, Athens, Ga.
H. M. Holden, S. C. Upson and Cobb & Erwin, Attorneys for Appellee, Athens, Ga.

U. S. Circuit Court of Appeals. Filed Oct. 6, 1913. Frank H. Mortimer, Clerk.

95 (*Stipulation as to Record on Appeal.*)

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. —. In Bankruptcy.

NATIONAL BANK OF ATHENS, Plaintiff in Error and Appellant,
vs.
F. C. SHACKELFORD, Trustee, for J. N. Webb, Bankrupt, Defendant in Error and Appellee.

Whereas, in the above entitled proceeding the appellant did on the — day of July, 1913, duly file in the District Court of the United States for the Eastern Division of the Northern District of Georgia, a citation and assignment of errors, with an appeal, which said appeal was allowed by order of the Hon. W. T. Newman, U. S. District Judge, on the 19th of July, 1913.

Now it is hereby stipulated that the record to be certified to this court by the Clerk of the U. S. District Court for the Northern District of Georgia on said appeal, — the following:

1. The original equitable petition with the exhibits and order

thereon filed by F. C. Shackelford, Trustee, against the National Bank of Athens and all entries thereon.

2. The original answer filed by the National Bank of Athens with all entries thereon.

3. The amendment filed by F. C. Shackelford, Trustee, and all entries thereon and order allowing it.

4. The amended answer filed by the National Bank of Athens, and all entries and orders thereon.

5. The stenographer's report of evidence in full had at the trial of said case, including stipulations of counsel.

6. A copy of the deed from J. N. Webb to the National Bank of Athens, including the date and hour it was filed of record, and the note from J. N. Webb to National Bank of Athens.

96 7. The entry showing the date and hour *of* involuntary proceedings in bankruptcy against J. N. Webb was filed.

7*a*. A copy of the deed from Webb & Crawford to National Bank of Athens, with entries thereon, and the three notes introduced with it.

8. A copy of the deed from J. N. Webb to J. F. Jackson and entries thereon.

9. The certificate of F. L. Upson, Referee, as to the indebtedness of J. N. Webb, and the Webb & Crawford Co.

9*a*. Creditors' petition for appointment of receiver for J. N. Webb and entries and orders thereon.

10. The opinion filed by the Hon. W. T. Newman, Judge, on July 17, 1913.

10*a*. The petition for bankruptcy against J. N. Webb with entries and orders thereon, including order of reference and adjudication and order approving trustee's bond.

11. The final decree, dated July 19, 1913.

12. The petition for appeal, and the order thereon, dated July 19, 1913.

13. The notice of appeal, dated July 19, 1913.

14. The appeal bond dated July 19, 1913.

15. The assignment of errors, notice of giving bond, prayer for reversal, all dated July 19, 1913, and supersedeas order.

This July 19, 1913.

(Signed) JNO. J. & ROY M. STRICKLAND,
Solicitors for Appellant.

We agree that the foregoing stipulation as to record on appeal is correct. This July 25, 1913.

(Signed) S. C. UPSON,
COBB & ERWIN,
HORACE M. HOLDEN,
Attorneys for Appellee.

(*Filing.*)

Filed in Office and docketed 6:30 P. M., July 25, 1913.

(Signed) O. C. FULLER, *Clerk*,
By W. G. CORNETT, *Dep. Cl'k.*

97 (*Citation.*)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to F. C. Shackelford, Trustee for J. N. Webb, or His Attorneys, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, within 30 days from the date hereof pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Georgia wherein National Bank of Athens is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William T. Newman, Judge of the District Court for the Northern District of Georgia, this 19th day of July, in the year of our Lord one thousand nine hundred and thirteen.

(Signed) WM. T. NEWMAN,
U. S. Judge.

(*Acknowledgment of Service.*)

Due and legal service of the within notice is hereby acknowledged, also copies of the petition and order, stipulation as to record, assignment of errors, prayer for reversal are likewise received. This July 24, 1913.

(Signed) S. C. UPSON,
H. M. HOLDEN,
COBB & ERWIN,
Solicitors for Frank Shackelford, Trustee for J. N. Webb.

(*Filing.*)

Filed in Clerk's Office 2:00 P. M. July 19, 1913.
O. C. FULLER,
By W. G. CORNETT,
Deputy Clerk.

98 (*Bond.*)

Know all men by these presents, That we, National Bank of Athens and James White are held and firmly bound unto F. C. Shackelford, Trustee for J. N. Webb, in the full and just sum of one thousand dollars to be paid to the said F. C. Shackelford, Trustee for J. N. Webb, his successors, certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators,

jointly and severally, by these presents. Sealed with our seals and dated this 19th day of July in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a hearing in a suit, depending in said court, between F. C. Shackelford, Trustee for J. N. Webb and National Bank of Athens, a decree was rendered against the said National Bank of Athens and the said National Bank of Athens having obtained and filed a copy thereof in the Clerk's Office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said F. C. Shackelford, Trustee for J. N. Webb, citing and admonishing him to be and appear before the United States Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the Condition of the Above Obligation is Such, That if the said National Bank of Athens, shall prosecute said appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) NATIONAL BANK OF ATHENS,
By JOHN R. WHITE, *President.* [SEAL.]
JAMES WHITE, *Secretary.* [SEAL.]

Sealed and delivered in presence of

JNO. J. STRICKLAND.
IRENE HILL,
N. P. Clarke Co., Ga.

Approved by

WM. T. NEWMAN,
U. S. Dist. Judge.

99 UNITED STATES OF AMERICA,
Northern District of Georgia:

—— ——, security on the within bond being duly sworn deposes and says that he is worth the sum of $— over and above his just debts and liabilities and exemptions under the homestead and exemption laws of the State of Georgia.

(Signed) JAMES WHITE.

Sworn to and subscribed before me this 19th day of July, 1913.

IRENE HILL,
N. P. Clarke Co., Ga.

(*Filing.*)

Filed in Clerk's Office 10:10 A. M. Aug. 8, 1913.

O. C. FULLER,
By W. G. CORNETT,
Deputy Clerk.

100 *Affidavit of W. G. Cornett, Deputy Clerk.*

United States Circuit Court of Appeals for the Fifth Circuit.

NATIONAL BANK OF ATHENS, Appellant,
vs.
F. C. SHACKELFORD, Appellee.

Appeal from the U. S. District Court of the Northern District of Georgia.

GEORGIA,
Clarke County:

Personally came before the undersigned an officer of said State and County authorized to administer an oath, W. G. Cornett, who being duly sworn, says:

I am the deputy clerk for the U. S. District Court for the Eastern Division of the Northern District of Georgia, and located at Athens, Georgia.

On the 25th day of July, 1913, Jno. J. Strickland brought to me all the papers for the purpose of appealing the above case, including the petition for appeal; the order allowing the same; the order of supersedeas; the assignment of errors; the notice and the stipulations as to the record, all signed up by the Attorneys interested. They were given to me, with the request to file them. I marked the petition for appeal, and the orders as if filed on July 19th, 1913, the date they were granted, instead of July 25th, the day they were filed. I did this because it is a rule of this office to file orders as of date on which they are granted. I likewise did not include in the record to be printed, the original citation, and a copy of the bond, and the agreement of counsel as to what should go up, for the reason that I understood they were not included in the agreement entered in by counsel because they were not included in the stipulation.

To this affidavit deponent attaches copy of the original citation (as the original citation was sent to the Clerk of the U. S. Circuit Court of Appeals, at New Orleans, La., with the transcript of record), and a copy of the bond, and a copy of the agreement
101 of counsel, to become a part of the record in said case.

(Signed) W. G. CORNETT.

Sworn to and subscribed before me this Oct. 1, 1913.

(Signed) IRENE HILL,
[SEAL.] *N. P. Clarke Co., Ga.*

(Clerk's Certificate to Additional Part of the Transcript.)

UNITED STATES OF AMERICA,
Northern District of Georgia, ss:

I, W. G. Cornett, Deputy Clerk of the District Court of the United States for the Northern District of Georgia, do hereby certify

that in the preparation of the transcript in the foregoing case, that by inadvertence I failed to include in the record and as part of the transcript the foregoing 7 pages, (except the affidavit pp. 6, 7, which has since been prepared) that the same are a true and correct copy of the original papers of file in the case and form a part of the record and are a part of the complete transcript thereof in this case.

In testimony whereof I have hereunto set my hand and the seal of the said District Court, at Athens, Georgia, this the 1st day of October, 1913.

[Seal U. S. District Court.]

(Signed) W. G. CORNETT,
Deputy Clerk U. S. District Court.

102 *Argument and Submission.*

Extract from the Minutes of October 6th, 1913.

No. 2548.

NATIONAL BANK OF ATHENS
versus
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb.

On this day this cause was called, and, after argument by John J. Strickland, Esq., for Appellant, who filed a motion to amend the Record as set forth therein, to which no objection was interposed by counsel for Appellee, and Howell C. Erwin, Esq., and Horace M. Holden, Esq., for Appellee, was submitted to the Court.

Opinion of the Court.

Filed October 29th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

103 No. 2548.

NATIONAL BANK OF ATHENS
v.
M. C. SHACKELFORD, Trustee, &c.

Appeal from the District Court of the United States for the Northern District of Georgia.

Before Pardee and Shelby, Circuit Judges, and Foster, District Judge.

By the COURT:

The evidence in this case tends strongly to show that although the mortgage given by the bankrupt to the appellant was for a

valid consideration and effective as between the parties thereto, the same by understanding, if not agreement, was withheld from record so as not to affect the mortgagor's credit; and we therefore concur with the trial Judge in his disposition of the case.

The decree appealed from is affirmed.

104 *Judgment.*

Extract from the Minutes of October 29, 1913.

No. 2548.

NATIONAL BANK OF ATHENS
versus
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby affirmed;

It is further ordered, adjudged and decreed that the appellant, The National Bank of Athens, and the surety on the appeal bond herein, James White, be condemned, in solido, to pay the
105 costs of this cause in this Court, for which execution may be issued out of said District Court.

Petition for Appeal and Order.

Filed December 2nd, 1913.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2548.

THE NATIONAL BANK OF ATHENS, Appellant,
vs.
F. C. SHACKELFORD, Trustee inBankruptcy for J. N. Webb, Appellee.

To the United States Circuit Court of Appeals for the Fifth Circuit:

The above mentioned Appellant, the National Bank of Athens, respectfully shows, that the above entitled cause is now pending in the United States Circuit Court of Appeals for the
106 fifth circuit; and that a judgment has therein been rendered on the 29th day of October, 1913, affirming the decree of the District Court of the United States for the Eastern Division of the Northern Division of Georgia; and that the matter in controversy

in said suit exceeds Two Thousand ($2,000.00) Dollars besides cost; that this cause is one in which the United States Circuit Court of Appeals for the Fifth Circuit has final jurisdiction; and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal; The case below involving the right of the Appellant to have the lien of a mortgage established as a first lien on the property of the bankrupt, J. N. Webb, which presents a controversy arising in bankruptcy proceeding.

Wherefore, the said Appellant prays that an appeal be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeal- for the Fifth Circuit, to send the
107 record and proceeding in said cause, with all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said Appellant may be reviewed, and if error be found, corrected according to the laws and custom of the United States.

(Signed) JNO. J. & ROY M. STRICKLAND,
JNO. J. STRICKLAND,
Att'ys for Appellant.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2548.

THE NATIONAL BANK OF ATHENS, Appellant,
vs.
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb, Appellee.

It is hereby ordered that the appeal in the above entitled
108 case to the Supreme Court of the United States be, and is hereby allowed as prayed; and bond fixed in the sum of $1,000.00 conditioned as the law directs.

This November 27th, 1913.

(Signed) DON A. PARDEE,
U. S. Circuit Judge, Fifth Circuit.

Assignment of Errors.

Filed December 2nd, 1913.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2548.

NATIONAL BANK OF ATHENS, Appellant,

vs.

F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb Appellee.

Assignment of Errors.

109 The Appellant in the above entitled cause in connection with its petition for appeal herein presents and files therewith, its assignment of errors, as to which matters and things it says that the decree entered herein on the 19th day of July, 1913, in the District Court for the Northern District of Georgia, and affirmed by a judgment of the Circuit Court of Appeals for the Fifth Circuit on October 29th, 1913 is erroneous.

I.

Because the said District Court erred in holding and ruling in effect that a deed executed under the laws of Georgia, to secure a debt created at the time of the execution of the deed, and more than four (4) months prior to bankruptcy was invalid under the bankrupt law as to other creditors.

II.

Because the said District Court erred in holding and ruling in effect that a deed executed to secure a debt created at the time of its execution must be recorded more than four (4) months
110 before bankruptcy in order to be valid as against the trustee for common creditors.

III.

Because the said District Court erred in holding and ruling in effect that the deed given to the National Bank of Athens set out in the record was void as to all other creditors, because not recorded more than four (4) months before bankruptcy whether such creditors had lien or not.

IV.

Because the said District Court erred in holding and ruling in effect that the trustee when appointed took as a judgment creditor as of the date when petition for bankruptcy was filed; and further holding that such trustee would get a superior lien to an unrecorded deed created by contract; and in thus holding that a lien created

by law, under the recording statute of Georgia, would be
111 be superior to a lien created by contract and under said statute could contest with such lien by contract.

V.

Because the said District Court erred in holding and ruling in effect that a deed executed to secure a present debt under the recording law of Georgia is void as against a judgment obtained by law unless such deed is recorded.

VI.

Because the said District Court erred in holding and ruling in effect that the recording statutes of Georgia would render a deed void if unrecorded as against a trustee in bankruptcy.

VII.

Because the said District Court erred in holding and ruling in effect that the deed made to the National Bank of Athens,
112 though filed for record at noon before the petition in bankruptcy was filed at nine (9) o'clock thereafter on the same day was void. The statutes of Georgia provides that the day and hour a paper is filed shall be entered thereon, and the deed in question filed for record at 12 o'clock noon became a perfect lien as against an application in bankruptcy filed at 9 o'clock the night of the same date and the Court erred in not so holding.

VIII.

Because the said District Court erred in holding in effect that the bank's deed was void as against J. F. Jackson, who had signed a note for the Webb & Crawford Company as security with J. N. Webb. He not in any sense being a creditor, nor having obtained any liens by contract on the property conveyed by the bank's deed.

113 IX.

Because the said District Court erred in holding in effect that J. F. Jackson, who took a deed second to and recognizing the bank's deed from J. N. Webb was not estopped to attack the deed recited in his deed.

X.

Because the said District Court erred in granting a decree that the property covered by the National Bank of Athens' deed should be sold freed from said deed, and thus holding said deed constituted a preference under the bankruptcy law, and was void.

XI.

Because the said District Court erred in not holding and ruling that the National Bank's deed was a valid subsisting lien as against the trustee, and all others, and in not decreeing that the property

should be sold and the bank's debt, including principal, interest and attorneys' fees paid .

114 XII.

Because the said District Court erred in enjoining the suit of the National Bank of Athens against J. N. Webb, and in decreeing that the bank should pay the costs in this case.

XIII.

Because the United States Circuit Court of Appeals erred in not reversing the judgment of the District Court upon each of the foregoing twelve (12) assignment of errors.

XIV.

Because the United States Circuit Court of Appeals erred in affirming the judgment below, and in so doing holding that "the evidence in this case tends strongly to show that although the mortgage given by the bankrupt to the appellant, was a valid consideration, and effective between the parties thereto, the same by understanding, if not agreement, was withheld from the record so as not to affect the mortgagor's credit." Appellant insist- that the evidence does
115 not justify this conclusion, and under the Statute of Georgia the record of a deed not being required, its absence from record would not invalidate it.

Wherefore the appellant prays that said decree may be reversed, and that the Appellant may have an adjudication and decree in its favor as herein specified.

(Signed) JNO. J. & ROY M. STRICKLAND,
JNO. J. STRICKLAND,
Attorneys for Appellant.

Bond on Appeal.

Filed December 2nd, 1913.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2548.

NATIONAL BANK OF ATHENS, Appellant,
vs.
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb, Appellee.

116 Know All Men by These Presents, That we, the National Bank of Athens, as principal, and James White as security, both of the County of Clarke and State of Georgia, are held and firmly bound unto F. C. Shackelford, Trustee in Bankruptcy for J. N. Webb, in the sum of One Thousand Dollars, to be paid to the said F. C. Shackelford, Trustee as aforesaid, for the payment of

which we bind ourselves, jointly and severally, our executors, administrators, and successors, firmly by these present.

Sealed with our seal, and dated this — day of November, 1913.

Whereas, the Appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Fifth Circuit on the 29th day of October, 1913.

Now, therefore, the condition of this obligation is such, that if the said Appellant shall prosecute said appeal to effect and
117 answer all damages and cost, if it fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) NATIONAL BANK OF ATHENS. [L. S.]
JOHN R. WHITE, *President.* [SEAL.]
[SEAL.]
JAMES WHITE. [SEAL.]

STATE OF GEORGIA,
Clarke County:

Personally came James White, the surety named in the foregoing bond, who being first duly sworn, says: That he is a resident and freeholder in the County of Clarke and State of Georgia; and is worth the sum of One Thousand Dollars, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

(Signed) JAMES WHITE.

118 Subscribed and sworn to before me, this 25th day of November, 1913.

(Signed) G. F. STEPHENSON,
N. P. Clarke County, Ga.

[SEAL.]

The foregoing bond is approved, this the 27th day of November, 1913.

(Signed) DON A. PARDEE,
U. S. Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, for the Fifth Circuit, do hereby certify that the pages numbered 80 to 118 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and

proceedings, including the opinion of the United States
119 Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2548, wherein National Bank of Athens is Appellant, and F. C. Shackelford, Trustee in Bankruptcy for J. N. Webb, is Appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 79 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 9th day of December, A. D. 1913.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

120 United States Circuit Court of Appeals for the Fifth Circuit.

No. 2548.

NATIONAL BANK OF ATHENS, Appellant,
vs.
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb, Appellee.

Citation to Appellee.

To F. C. Shackelford, Trustee in Bankruptcy for J. N. Webb:

You are hereby cited, and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Fifth Circuit wherein the National Bank of Athens is Appellant, and you are Appellee, to show cause, if any there be, why the decree rendered against the said Appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Don A. Pardee, Judge of the United States Circuit Court of Appeals for the Fifth Circuit, this the 27th day of November, 1913.

DON A. PARDEE,
Judge U. S. Circuit Court of Appeals, Fifth Circuit.

121 Due & legal service of a copy of the within citation is hereby acknowledged.
This Dec. 1st, 1913.

F. C. SHACKELFORD,
Trustee in Bankruptcy for
J. N. Webb, Appellee,
By his Attorneys at Law, COBB AND ERWIN,
S. C. UPSON,
HORACE M. HOLDEN.

[Endorsed:] No. 2548. U. S. Circuit Court of Appeals, Fifth Circuit, Term, 191-. National Bank of Athens, Appellant, vs. F. C. Shackelford, Trustee, Appellee. Original. Citation to Appellee. Filed in Office and docketed December 2nd, 1913. F. H. Mortimer, Clerk. Jno. J. & Roy M. Strickland Law offices, Athens, Ga.

Endorsed on cover: File No. 23,975. U. S. Circuit Court Appeals, 5th Circuit. Term No. 317. The National Bank of Athens, appellant, vs. F. C. Shackelford, trustee in bankruptcy for J. N. Webb. Filed December 22d, 1913. File No. 23,975.

No. 317 40

In the Supreme Court of the United States

October Term, 1914

The National Bank of Athens,
Appellant

vs.

F. C. Shackelford, Trustee in Bankruptcy for J. N. Webb

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit

Brief for Appellant

Jno. J. & Roy M. Strickland,
Attorneys

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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1914.
No. 317.

THE NATIONAL BANK OF ATHENS, Appellant,
vs.
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb.

BRIEF FOR APPELLANT

BY

JNO. J. & ROY M. STRICKLAND.

STATEMENT OF CASE.

On November 6, 1911, J. N. WEBB borrowed from THE NATIONAL BANK OF ATHENS TWELVE THOUSAND DOLLARS, and gave his note therefor due in sixty days. To secure this note Webb executed to the bank a warrantee deed conveying a lot of land in the City of Athens, Clarke County, Georgia. (Page 40 of the record.)

This deed was not then recorded. The note was renewed from time to time, and the last one given July 6, 1912. (Page 41 of the record.)

J. N. Webb was a stockholder in a commercial corporation known as the WEBB & CRAWFORD COMPANY.

On August 13, 1912, an involuntary petition in Bankruptcy was filed against the Webb & Crawford Company.

On August 14, 1912, at noon the deed from J. N. Webb to the National Bank of Athens was filed for record, and that night at nine o'clock an involuntary proceeding in bankruptcy was filed against J. N. Webb.

On October 5, 1912, the National Bank of Athens served on J. N. Webb the statutory notice of intention to sue, and the claim of 10 per cent. of Attorney's fees, and after ten days filed its suit to the November Term, 1912, of the City Court of Athens on said note and asking a special lien on the land described in the deed mentioned.

On August 14, 1912, J. N. Webb executed to Jack F. Jackson a deed subject to the deed of the National Bank of Athens on the same property to secure an indebtedness. (Page 45 of the record.)

F. C. Shackelford on October 19, 1912, qualified as Trustee for J. N. Webb.

On November 15, 1912, F. C. Shackelford, as Trustee, filed his equitable petition in the District Court of the United States for the Eastern Division of the Northern District of Georgia, addressed to the Hon. W. T. Newman, Judge, alleging the facts just enumerated, and that the deed of the National Bank of Athens was void, and praying to enjoin the bank from proceeding with its suit. (Page 2 of the record.)

By an amendment filed on the 18th of June, 1913, (Page 12 of the record) the said Shackelford, Trustee, alleged that the deed of the bank was void, and asked that the same be cancelled for the following reasons:

(1) Because the deed was held from record for the purpose of preserving the credit of J. N. Webb,

and that this was done by an agreement between the Bank and Webb.

(2) That the deed was filed for record on the day of the proceeding in Bankruptcy against Webb, and that withholding of said deed from record was a fraud.

(3) That Jack F. Jackson extended credit based on the absence of any deed of record, and the same was therefore void as to him, and as to all other creditors. (Page 12 of the record.)

The National Bank of Athens denied all these allegations. (Page 14 of the record.)

The case was tried before the Honorable W. T. Newman on the evidence adduced as to the issues made. (Page 16 to 29 of the record.)

On July 17, 1913, Judge Newman rendered an opinion as follows:

> "Under any view of the facts, assuming the testimony of Capt. White to be true, and leaving out of view entirely the testimony of Webb, it seems clear that this instrument would be void and ineffective as against Jackson. He assumed the liability as indorser on the Webb & Crawford paper because he found no incumbrances against them, and says expressly that he would not have indorsed for them if he had found these incumbrances. It seems to me there is no law and no authorities anywhere under which the mortgage could be enforced against Jackson.
>
> If it is invalid as to Jackson, then under the decision of the circuit Court of Appeals for this Circuit, in re Dugan, 183 Fed. 405, it would be void as to all the creditors. Other authorities might be cited, but I think the rule in the Dugan

case must control as it was rendered by the Circuit Court of Appeals for this circuit.

Having this view of the case, it is unnecessary to consider any of the other interesting questions discussed by counsel at the bar and in the briefs submitted by them.

Counsel have apparently agreed to submit the matter on its merits, judging by their statement in open court and in their briefs, as to the validity of this mortgage and its effects as a prior lien. There is an amendment to the bill which is sufficient so far as the allegations go, but what the bill seems to lack is a prayer or prayers for the relief indicated by the amendment. There is a general prayer for relief attached to the original bill.

The National Bank of Athens, so far as I can see, must stand as a general creditor of the bankrupt estate. The trustee is entitled to a decree carrying into effect what is stated above.

This 17th day of July, 1913." (Page 32 of the record.)

A decree was on July 19, 1913, entered in accordance with this opinion.

On July 19, 1913, the National Bank of Athens applied for and obtained an order allowing an appeal to the United States Circuit Court of Appeals for the 5th Circuit. (Page 35 of the record.)

On October 29, 1913, the Circuit Court of Appeals rendered an opinion as follows:

"The evidence in this case tends strongly to show that although the mortgage given by the

bankrupt to the appellant was for a valid consideration and effective as between the parties thereto, the same by understanding, if not agreement, was withheld from record so as not to affect the mortgagor's credit; and we therefore concur with the trial Judge in his disposition of the case.

The decree appealed from is affirmed."

A decree was taken accordingly. (Page 75 and 76 of the record.)

On November 27th,1913,the National Bank of Athens obtained an order appealing said case to the United States Supreme Court. (Page 77 of the record.)

The decree rendered in the case is erroneous for the reasons apparent in the following assignments of error:

I.

Because the said District Courterred in holding and ruling in effect that a deed executed under the laws of Georgia to secure a debt created at the time of the execution of the deed, and more than four (4) months prior to bankruptcy was invalid under the bankrupt law as to other creditors.

II.

Because the said District Court erred in holding and ruling in effect that a deed executed to secure a debt created at the time of its execution must be recorded more than four (4) months before bankruptcy in order to be valid as against the trustee for common creditors.

III.

Because the said District Court erred in holding and ruling in effect that the deed given to the National Bank of Athens set out in the record was void as to all other creditors, because not recorded more than four (4) months before bankruptcy whether such creditors had lien or not.

IV.

Because the said District Court erred in holding and ruling in effect that the trustee when appointed took as a judgment creditor as of the date when petition for bankruptcy was filed; and further holding that such trustee would get a superior lien to an unrecorded deed created by contract; and in thus holding that a lien created by law, under the recording statute of Georgia, would be superior to a lien created by contract and under said statute could contest with such lien by contract.

V.

Because the said District Court erred in holding and ruling in effect that a deed executed to secure a present debt under the recording law of Georgia is void as against a judgment obtained by law unless such deed is recorded.

VI.

Because the said District Court erred in holding and ruling in effect that the recording statutes of Georgia would render a deed void if unrecorded as against a trustee in bankruptcy.

VII.

Because the said District Court erred in holding and ruling in effect that the deed made to the National Bank of Athens, though filed for record at noon before the petition in bankruptcy was filed at nine (9) o'clock thereafter on the same day was void. The statutes of Georgia provides that the day and hour a paper is filed shall be entered thereon, and the deed in question filed for record at 12 o'clock noon became a perfect lien as against an application in bankruptcy filed at 9 o'clock the night of the same date and the Court erred in not so holding.

VIII.

Because the said District Court erred in holding in effect that the Bank's deed was void as against J. F.

Jackson, who had signed a note for the Webb & Crawford Company as security with J. N. Webb. He not in any sense being a creditor, nor having obtained any liens by contract on the property conveyed by the Bank's deed.

IX.

Because the said District Court erred in holding in effect that J. F. Jackson, who took a deed second to and recognizing the bank's deed from J. N. Webb was not estopped to attack the deed recited in his deed.

X.

Because the said District Court erred in granting decree that the property covered by the National Bank of Athens' deed should be sold freed from said deed, and thus holding said deed constituted a preference under the bankruptcy law, and was void.

XI.

Because the said District Court erred in not holding and ruling that the National Bank's deed was a valid subsisting lien as against the trustee, and all others, and in not decreeing that the property should be sold and the Bank's debt, including principal, interest and attorney's fees paid.

XII.

Because the said District Court erred in enjoining the suit of the National Bank of Athens against J. N. Webb, and in decreeing that the Bank should pay the costs in this case.

XIII.

Because the United States Circuit Court of Appeals erred in not reversing the judgment of the District Court upon each of the foregoing twelve (12) assignments of errors.

XIV.

Because the United States Circuit Court of Appeals

erred in affirming the judgment below, and in so doing holding that

> "the evidence in this case tends strongly to show that although the mortgage given by the bankrupt to the appellant, was a valid consideration, and effective between the parties thereto, the same by understanding, if not agreement, was withheld from the record so as not to affect the mortgagor's credit."

Appellant insists that the evidence does not justify this conclusion, and under the Statute of Georgia the record of a deed not being required, its absence from record would not invalidate it.

(Page 78 to 80 of the record.)

BRIEF OF ARGUMENT.

The questions arising under the records that will determine the issues made are the following:—

I.

APPEALED THE REMEDY.

In the case of Knapp, Trustee vs. Milwaukee Trust Company 216 U. S. page 545 (54 L. E. p. 610) this court decided as follows:

> "Appeal—from Circuit Court of Appeals—Bankruptcy Case—special finding.
>
> 1. The special finding of fact requisite under general order in bankruptcy No. 36, on an appeal to the Federal Supreme Court, under the bankruptcy act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), § 25b, from a final decision of a circuit court of

appeals allowing or rejecting a claim under that act, is not required where the decision below is one denying the right invoked by a petition in intervention to have the lien of a chattel mortgage established as a first lien on the property of the bankrupt, and satisfied out of the proceeds of a proposed sale by the trustee in bankruptcy, since such a contention presents a controversy arising in bankruptcy proceedings over which the circuit courts of appeals, under § 24a of the bankrupt act, exercise appellate jurisdiction as in other cases, and the circuit court of appeals act of March 3, 1891, governs the manner of review in the Supreme Court."

The same is ruled in

Hobbs 231 U. S. page 2692 (58 L. E. p. 540.)

II.

THE DEED TO THE NATIONAL BANK DID NOT EFFECT A PREFERENCE.

The first important question to be determined is whether or not J. N. Webb in executing the deed under consideration, thereby effected a preference in favor of the Bank, and thus violated the Bankrupt Act. The purpose of the Act is to secure to creditors of a like class an equal per cent. on their debts. The Bankrupt Act in all of its prohibitions deals with creditors existing at the time the alleged preference was given. Par. 60b of the Bankrupt Act provides as follows:

b. If a bankrupt shall have procured or suffered a judgment to be entered against him in

favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or if the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment and transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

The deed in question did not effect a preference for the following reasons:

1. The Bank to whom the deed was made was not then a creditor. The Bankrupt Act is intended to protect one creditor as against another, and the prohibitions are against transferring property to pay or secure a pre-existing debt. Many decisions of the Lower Courts have gotten into confusion due to the fact that the Judges lost sight of the limitations of the prohibitions of the Bankrupt Act. Indeed the Act itself all the way through deals with creditors. A man is not a creditor who does not have a pre-existing debt. To make the question beyond doubt, paragraph 67d of the Bankrupt Act provides:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was

necessary in order to impart notice, shall to the extent of such present consideration only, not be affected by this act."

In order to constitute a preference the transaction must diminish the debtor's estate. In the case of National Bank of Newport vs. National Herkimer County Bank, 225 U. S. page 178, (56 L. E. 1042) the second head note is as follows:

> "2. A creditor of a bankrupt cannot be charged with receiving a voidable preference by transfer, within the meaning of the bankrupt act of July 1, 1898, § 60, as amended by the act of February 5, 1903, unless he takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished."

Whether or not the prohibited preference dealt with in the bankrupt act applies to pre-existing debts only, so far as we know, has not been directly passed on by this Court. The question, however, was decided in the case of Watson, 201st F. R. 962. The opinion in the case was delivered by District Judge Cochran. The first and second headnotes are as follows:

> "1. Bankruptcy (§163*)—Voidable Preference—Recordable Transfers. The only effect of the amendments of Bankr. Act July 1, 1898, c. 541, §60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506), by the addition of the provision that, 'where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of

the transfer, if by law such recording or registering is required,' was to carry forward the four months' period within which a recordable transfer which was in fact preferential might be attacked as voidable under subdivision 'b,' leaving the question whether or not the transfer constituted a voidable preference to be determined as of the date when it was actually made; and a transfer which was then made for a present consideration, and was not therefore preferential, does not become so because of delay in recording.

2. Bankruptcy. (§163*)—Voidable Preference —Recordable Transfers. Nor did the amendment of Act July 1, 1898, c. 541, §60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), by Act June 25th, 1910, c. 412, §11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), change the effect of the Act in that respect, it being essential to a preferential transfer, both before and after amendment, that it should have been to or for the benefit of a pre-existing creditor, who thereby gained an advantage over other creditors."

This case was affirmed by the Circuit Court of Appeals, and appears as Dupree vs. Watson 116 F. R. p. 483.

The logical reasoning in this case is so clear and conclusive that we ask the court to read it as part of our argument, beginning on page 964 of the opinion.

It is conceded in this case that the National Bank, at the time it took the deed in question, was not a creditor of J. N. Webb. It is suggested, however, in the argument of the trustee's attorneys that J. N. Webb bor-

rowed the TWELVE THOUSAND ($12,000.00) DOLLARS to be used by a corporation, the Webb & Crawford Company, and that the last company was insolvent. The facts do not bear this out. On page 28 of the record, Capt. White testified as to the rumors, that the Webb & Crawford Company was insolvent as follows:

"Q. Is it not a fact that at the time this occurred there were reports and rumors that they were embarrassed?

A. Mr. Erwin, I loaned them $22,000.00 about that period, and if I had believed they were in that condition I would not have loaned them a dollar."

But granting the Webb & Crawford Company were insolvent it would not affect this transaction. In the Robert Van Iderstine, Trustee vs. National Discount Company, reported in the 227 U. S. 575 (57 L. E. 652) it is held:

> "2. The mere knowledge that the money loaned to an insolvent firm on the security of its book accounts within four months of the bankruptcy proceedings was to be used to pay an existing debt does not charge the transferee with knowledge of any intent on the part of the borrower to defraud, so as to entitle the trustee in bankruptcy to have the transfer set aside as fraudulent."

2. The deed in question is not a preference, because J. N. Webb was not insolvent at the time the same was made. The deed was dated November 6, 1911 (page 40 of the record.) J. N. Webb in his evidence (page 19 of the record) testifying as to his financial condition when the deed was made said:

"Q. Now Mr. Webb at the time you borrowed the

the $12,000.00 in November, 1911, you believed you were then solvent?

A. Up to that time I thought I was.

Q. The Webb & Crawford Company was solvent at that time?

A. I don't know; as I stated we were pretty hard up.

Q. You believed it was solvent?

A. Yes.

Q. You were putting in your own money to pull it out of a hole?

A. Yes."

Certainly Webb believed himself solvent at that time. He had a large estate and apparently was a man in magnificent condition. This is illustrated by the fact that Webb was putting his own money in the Webb & Crawford Company in which he held a large quantity of stock.

3. In order for the deed to be void under the Bankrupt Act, the paragraph above quoted, it was necessary for the transfer or deed to operate as a preference. For the reasons above stated, this could not be a preference, because it was a present transaction, and because it was not thereby giving one creditor more than another, and because it did not diminish the estate of Webb.

4. The statute further provides that in order to make the deed void,

> "The person receiving it * * * * shall then have reasonable cause to believe that the * * * * transfer would effect a preference."

Capt. White testifies (page 26 of the record) that the $12,000.00 was the first money borrowed, and about the time the deed was made the bank loaned to Webb & Crawford Company $22,000.00 more. This conduct

demonstrates beyond dispute that Capt. White in representing the bank, did not have reasonable cause to believe that the transfer would effect a preference. As appears from his evidence he thought Webb perfectly good, and that the debt would be paid.

III.

NON-RECORD OF DEED.

It is insisted, however, by the Trustee that the deed in question is void and effects a preference because not recorded when given. This question must be determined by the Statutes of Georgia as construed by the Court of last resort of that State touching registration. In the case of Holt, Trustee, reported in the 224 U. S. 264 (56 L. E. 757), Mr. Justice Van Devanter delivering the opinion, uses this language:

> "It is apparent from the language of §67a and from the decisions of this Court in York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Thomas v. Taggart, 209 U. S. 385, 52 L. ed. 845, 28 Sup. Ct. Rep. 519, and other like cases, that the effect to be given to the unrecorded chattel mortgage must be determined by the recording law of the state; and it is also apparent that the question arising under that law turns upon who are included in the term 'creditors' in §496.
>
> Upon that question the decisions of the Court of Appeals * of the State have not been uniform, but it is conceded, and is evident upon an examination of the more recent decisions, that the term

does not include antecedent creditors or subsequent creditors whose claims are acquired with notice of the unrecorded mortgage, but does include subsequent creditors without notice, who, by their diligence, secure a specific lien upon the property, as by execution or attachment, before the mortgage is recorded."

In discussing the effect of the deed in question it is necessary to bear in mind the rights of a Trustee in Bankruptcy under the law as it stood in 1912. Section 47 A of the Bankrupt Act as amended in 1910 as to such Trustee, provides:

> "And such Trustees, as to all property in the custody or coming into the custody of the Bankrupt Court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also as to all property not in the custody of the Bankrupt Court shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

The property in question was not in the Bankrupt Court. In addition to the deed made to the bank, Webb made a second deed to J. F. Jackson, and a third to his wife who went in possession and is to this day. Therefore the rights of the Trustee had to be determined under this Statute as to property not in the custody of the Bankrupt Court and his rights are those of a judgment creditor holding an execution duly returned unsatisfied.

Whether the Trustee was clothed with this power on the filing of the petition in Bankruptcy at 9:15 P. M. on Aug. 14th, 1912, or when the Trustee qualified on

Oct. 19th, 1912, we don't think is material in this case. The purpose of the amendment is elaborately discussed in Collier on Bankruptcy, 9th Edition Page 659. Treating the Trustee, therefore, with the rights of a judgment creditor when the petition in Bankruptcy was filed, the question arises as to what the respective rights of the Trustee and the Bank were as to this land. The deed in question on its face is an absolute warranty deed. Though made to secure a debt the deed passes the title. Code of Georgia of 1910, Paragraph 3306, provides as follows:

> **Absolute deeds and not mortgages.** Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said vendor any money or to secure any other debt, and shall take a bond for titles back to said vendor upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale and take an obligation binding the person to whom said prop-property is conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass the title of said property to the vendee till the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts of this State to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and not a mortgage."

The question then is could a judgment under the law

of Georgia be levied on this land. The Code of Georgia of 1910, Section 6038, provides as follows:

> "Where any person other than the vendor, or other than the holder or assignee of the purchase-money or secured debt, shall have any judgment against a defendant in fi. fa. who does not hold legal title to property but has an interest or equity therein, such plaintiff in fi. fa. may take up the debt necessary to be paid by the defendant in order to give such defendant legal title to the property, by paying such debt with interest to date, if due, and interest to maturity if not due; and thereupon a conveyance to the defendant in fi. fa., or, if he be dead, to his executor or administrator, shall be made by the vendor or holder of title given to secure the debt, or, if dead, by the executor or administrator thereof; and when such conveyance has been filed and recorded, the said property may be levied on and sold as property of the defendant. The proceeds shall be applied, first, to the payment of liens superior to the claims taken up by the plaintiff in fi. fa.; next, to the payment of principal advanced by said plaintiff in fi. fa. to put title in defendant, with interest to date of sale; and the balance to the execution under which said property is sold, and to other liens according to priority, to be determined as in other cases of money rules."

Where land has been deeded to secure a debt, the same can not be levied on until a deed has been filed back and recorded. In the case of the National Bank of Athens, 80 Ga. page 56, the head note is as follows:

> "A fi. fa. issued upon a judgment rendered for a debt secured by a deed made under Section

1969 of the Code, cannot be levied upon the realty conveyed as security until after the creditor has executed, filed, and had recorded a deed re-conveying the property to the debtor; and a sale by the sheriff to the creditor, the levy having been made after the execution of such deed, but before it was either filed or recorded, is utterly void."

This has been uniformly followed.

It would seem to follow that in the absence of any other authority, the Trustee, since he has nothing more than a judgment, could not levy and sell this land nor could he as Trustee sell it.

The Registration Act of Georgia, Code of 1910, Section 3320, provides as follows:

> "Deeds, mortgages, and liens of all kinds, which are now required by law to be recorded in the office of the clerk of the superior court of each county within a specified time, shall, as against the interests of third parties acting in good faith and without notice, who may have acquired a transfer of lien binding the same property, take effect only from the time they are filed for record in the clerk's office. And the said clerk is required to keep a docket for such filing, showing the day and hour thereof, which docket shall be open for examination and inspection as other records of his office."

This section as construed by the Supreme Court of Georgia must determine the question as to whether or not the non-record of the deed in question at the time it was made invalidates it as against the Trustee. We insist that it does not for the following reasons:

1. The Act in question has no reference to liens ex-

cept those created by contract. The lien by judgment, being not by contract, is postponed to a deed though unrecorded. In the case of Bailey vs. Bailey reported in the 93 Ga. page 768, the head note is as follows:

> "Making every concession as to the fullest possible scope of the first section of the Act of 1889, providing when transfers and liens shall take effect as against third persons, it is certain that the lien of judgments, to which the second section of the Act applies, dates, as to bona fide conveyances by the debtor to third persons, only from the time the executions issuing thereon shall be entered upon the general execution docket, unless such entry be made within ten days after the judgments were rendered. Hence, such conveyances made by absolute deed, whether intended to secure a debt or for full ownership, and whether made before or after the judgment in question was rendered, are not affected by the judgment if the deed was actually recorded before the execution based on the judgment was entered on the general execution docket, such entry having been delayed until after the ten days limit had expired. A deed for value, made and taken bona fide before a judgment against the maker was rendered, may be filed for record and recorded after rendition of the judgment and with notice of the same, without subjecting the property conveyed to a lien of the judgment, where that lien dates only from a subsequent entry of the execution on the proper docket."

In that case it will be observed that the Court deals with an absolute deed and gives it the same effect whether the deed was for full ownership or intended to

secure a debt. The Court expressly left open the meaning of the word "lien" by using this language on Page 771:

> "We * * * do not now pass upon the question as to whether or not the word 'lien', where used in the phrase 'transfer or lien binding the same property', occurring in that section, is to be understood as applying only to liens acquired by contract, or as including also liens by judgment."

This question came squarely before the Supreme Court in the case of Donovan 96 Ga. Page 340. In that case the first two head notes are as follows:

> "The registry act of 1889 (Acts of 1889, p. 106), providing 'when transfers and liens shall take effect as against third parties," does not create a new competition between deeds of bargain and sale and the liens of judgments. Its scope is to fix the time when, and the manner in which, liens acquired by contract or obtained by operation of law are to take effect, and to settle their priorities. Inasmuch as the word 'lien,' as used in the phrase ' who may have acquired a transfer or lien binding the same property,' occurring in the first section of that act, applies only to liens acquired by contract, and not to those obtained by judgment, the consequences of a failure to record a deed of actual purchase are exactly the same now as they were prior to the passage of that act; and accordingly, while the failure to record such a deed might operate to defeat the conveyance as to one who purchased subsequently of the same vendor without notice of the prior conveyance, a judgment obtained against the grantor subsequently to the conveyance, but entered upon the general execution docket prior to

the record of the deed, would not, merely by virtue of such entry, become a lien upon the property previously conveyed.

2. In view of the principles above announced, it is immaterial whether the claimants were, or were not, after their purchase, in actual possession of the lot levied upon, since their unrecorded paper title was of itself sufficient to support the claim as against the plaintiff's judgment.

In the body of the decision, page 346, the learned Judge says:

"It is evident the word 'lien' as here used, has reference exclusively to liens acquired by contract. 'Lien' is a generic term, and includes both liens acquired by contract and by operation of law; but the context clearly indicates it is used here in its restricted sense as applicable only to contractual liens."

It is true that in the Donovan case the deed was an absolute conveyance and not a security for debt and the subsequent decisions following this case reported in the Georgia Reports quote the words "between deeds of bargain and sale and the liens of judgment." The words however "of bargain and sale" have reference to the form of the paper rather than to the effect. In the case already cited in the 93rd Georgia, it is distinctly held that it is immaterial as to the purpose of the deed provided it is in form of a deed of conveyance. So far as we have been able to find, the question as to whether or not the rule applies to any deed has not been passed on since the 93rd Ga. The case of Henderson, 128 Ga. page 811, refers to the decision but without in any way modifying it. The case of Smith, 10 Ga. App. page 282,

in discussing the question cites the Donovan case and says: "A valid deed though unrecorded is superior to a subsequent judgment or transfer against the same property." In the case of Griffin reported in the 98 Ga. page 475, the head note is as follows:

> "The word 'lien' in the phrase 'as against the interest of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the defendant's property,' occurring in the second section of the Registry Act of 1889 (Acts of 1889, p. 107), applies only to liens acquired by contract, and consequently, this Act has no application to contests between ordinary common law judgments. Therefore, the older of two such judgments against the same defendant has priority over the younger, as to a fund arising from a sale of his property, although the execution issued upon the younger may have been duly entered upon the general execution docket, and the execution issued upon the older has never been entered upon that docket at all."

From this it appears that the Court has again held that the word "lien" in the Registration Act applies only to liens acquired by contract. In the case of Jones reported in the 99 Ga. page 457, it is provided:

> "It will be noted that this was a contest between a mortgage duly recorded, and a lien arising upon a levy of a distress warrant. It was a contest between a lien acquired by contract and a lien imposed by law, and in the case of Donovan vs. Simmons, 96 Ga. 340, it was held that the registry act of 1889 (Acts of 1889, p. 106), which provides when transfers and liens shall take effect as against third persons, has no application

to a case of the character now under consideration."

In the case of New South Building & Loan Association, 101 Ga. page 679, the Court says:

> "Registry does not give character to a paper; it is simply a notice of what the paper is and what it affects. Hester v. Young, 2 Ga. 45. The danger of a failure to record a deed is the exposure of it to defeat by a subsequent vendee without notice of the prior purchase. Donovan v. Simmons, 96 Ga. 340."

In the case of Lytle, 107 Ga. page 388, the Court says:

> "The only effect of a failure to record within the time prescribed by law was to lose the right to rely upon the deed as title against any one who received upon a valuable consideration and had recorded in due time a deed to the same property from the grantor, without notice of the existence of the prior unrecorded deed. New South B. & L. Ass'n v. Gann, 101 Ga. 678; White v. B. & L. Ass'n, 106 Ga. 146. As title to the property in dispute passed out of the husband long before the judgments against him were rendered, the lien of such judgments never attached to the property. In the case of Donovan v. Simmons, 96 Ga. 340, it was held that the registry act of 1889 did not create any new competition between deeds of bargain and sale and liens of judgments; Judge Hart in the opinion saying that 'To hold that a judgment acquired shall be a lien upon land conveyed in a prior unrecorded deed, would be to hold that a judgment shall be a lien upon other than the defendant's property.' The sale of land, although the deed may not have been re-

corded, as between the parties to the contract, and indeed as to all the world, is a parting of the right of title and ownership from the grantor to the grantee; and to hold that an after-acquired judgment against the grantor shall become a lien upon the property conveyed, would be to add to judgments a quality never possessed heretofore, and to take from a deed a condition heretofore always recognized.' What is said there with reference to deeds of bargain and sale would seem to apply in principle to a voluntary deed made by a person solvent at the time of its execution and delivery. Such a deed by such a person is as effectual to pass title to the grantee as a deed founded upon a valuable consideration; and after the title has passed, a judgment against the grantor rendered after he has thus parted with the title can never be a lien upon the land."

From these authorities it is apparent that a judgment or fi. fa. obtained when Bankruptcy proceedings were filed could not have been levied on the land in question. The deed passed the title and the same could not have been levied on under a judgment. If the Trustee had obtained his lien by contract and without notice, the rule would have been different. It was held by this Court in the case of Knapp, 216 U. S. 545 (54 L. E. 610) that

> "Under the Bankrupt Act of July 1st, 1898, § 70a, the Trustee in Bankruptcy takes title to the property of the bankrupt which could have been levied upon and sold under judicial process against the bankrupt at the time of the adjudication in bankruptcy."

The reverse of this proposition of course is true and

since this land in question could not have been levied upon and sold under Judicial process against the Bankrupt Webb at the time of the adjudication in Bankruptcy, the Trustee does not take.

2. Another reason why the deed in question is valid regardless of the fact that it was not recorded when made is that it was recorded before the petition against Webb was filed. The deed was recorded at 12:05 on Aug. 14th, 1912, and the petition filed at 9:15 that night. Granting for the sake of the argument, therefore, that the Trustee with his lien as of a judgment, could contest with the Bank's deed, the deed had been perfected before the Trustee's lien came into existence.

It is suggested, however, by the Trustee that inasmuch as these instruments were both filed the same day that they were of the same age because there is no division of a day under the Common Law. The reply to this is that the Statute of Georgia must control and under that Statute the day has been divided up into hours. Section 3320 of the Code 1910 providing for the filing and recording of instruments, in part is as follows:

> "And the said clerk is required to keep a docket for such filing, showing the day and hour thereof, which docket shall be open for examination and inspection as other records of his office."

It would be nonsense for the legislature to require such a docket kept if all deeds or liens filed the same day had the same priority regardless of the time of day filed. The Common Law was changed by the Registration Act of 1889. This change is recognized in the case of Henderson 128 Ga. page 807.

3. It is apparent from the record that the National Bank held the only deed or mortgage that was in existence at the time and therefore the bank was in a class to itself. The Bankrupt Act Section 60, in describing a preference, says:

> "And the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

In the case of Dickinson, Trustee, reported in the 120 Ga. on page 632, which was an unrecorded mortgage, the Court held that where it appeared that there were no other lien creditors, and there was no intention to hinder, delay, or defraud creditors in taking the mortgage, that the same would be upheld though not recorded, upon the ground that there were no other creditors of the same class being affected thereby.

There is a difference between a Statute requiring the record of a deed to give it validity and one permitting or conditionally requiring the same. In the case of Boyd from the 2nd Circuit Court of Appeals, reported in the 213 F. R. page 774, the head note is as follows:

> "Bankr. Act July 1, 1898, c. 541, § 3b, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), provides that involuntary petitions may be filed within four months after any act of bankruptcy, and that such time shall not expire until four months after the date of recording or registering a preferential transfer, if by law such recording is 'required or permitted.' Section 60 relative to avoiding preferences, provides that, where the preference consists in a transfer, the period of

four months shall not expire until four months after the day of the recording or registering thereof, if by law such recording or registering is 'required.' Held, that 'required' in section 60, does not mean the same as 'required and permitted,' in section 3b, and hence, where a mortgage given more than four months before bankruptcy, but recorded within that time, was under the state law valid as to judgment and general creditors without recording, it could not be avoided; the words 'require' and 'permit' expressing different ideas, and the one not ordinarily including the other."

The same doctrine is laid down in a number of cases cited by the above stated case. We are aware that a different ruling has been made by Judge Newman in the Social Circle Cotton Mills Case reported in the 113 F. R. page 994, but think the learned Judge erred in that case as in this. In the case of Davis et. al. from the 4th Circuit Court of Appeals, reported in the 210 F. R. page 768, in construing a Statute of West Virginia similar to that of Georgia as to the effect of an unrecorded mortgage, the Court rules as follows:

"2. Bankruptcy (§ 184*)—Liens—Effect of State Recording Statute.

Code W. Va. 1906, sec. 3103 (chapter 74 § 5), which provides that a mortgage or deed of trust 'shall be void as to creditors * * * until and except from the time that it is duly admitted to record,' as construed by the highest court of the state, does not make an unrecorded mortgage void as to general creditors but only as to such as have secured liens, and a trust deed executed by a bankrupt corporation, if otherwise valid, is

not rendered invalid as against the trustee by the fact that it was not recorded until within four months prior to the bankruptcy.

"3. Bankruptcy (§ 177*)—Preferences—Mortgage Recorded within Four-Month Period.

A transfer made by a bankrupt is to be judged, in determining the question whether or not it constitutes a preference under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506), as of the time when it was made and not of the time of its registration."

In that case as in the case at bar no creditor had obtained a lien until after the mortgage was recorded and therefore under the recording Statute the mortgage was good. This Court in the case of Holt vs. Henley, Trustee, reported in the 232 U. S. 637, (58 L. E. 767), in discussing the effect of an unrecorded deed, on page 640 says: "His continuing title simply was postponed to purchasers without notice and creditors getting a lien." This is likewise true of the Bank's title in the case at bar.

In the case of Scruggs 205 F. R. page 674, it is held:

"A Bankrupt's Trustee does not take the Bankrupt's property as a bona fide purchaser for value, but holds it subject to all valid claims, liens, and Equities, the validity of which is to be determined in the absence of Federal Statutes, by the local law as evidenced by the decisions of the State Court." See also East End Mantel & Tile Company 202 F. R., page 275.

In construing the Kentucky Statute similar to the

Georgia Statute, this Court, in the case of Holt, Trustee, 224 U. S. page 262 (56 L. E. 756) said:

"Subsequent creditors without notice of an unrecorded chattel mortgage, who have not secured any specific lien upon the mortgaged property by execution, attachment or otherwise, are not comprehended by the term 'Creditors' as used in Ky. Stat. 1903, § 496, which provides that no unrecorded mortgage shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors."

In the case of Wall reported in the 207 F. R. page 994, the Court holds that:

"The word 'Creditors' is limited in meaning to such creditors as have acquired a specific lien upon the property * * * but the Trustee takes no greater right therein than the bankrupt had as against the seller." See also Lane Lumber Company 210 F. R. 82. See also Anderson 208 F. R. page 401.

IV.

THE DEED NOT MADE WITH INTENTION TO DELAY OR DEFRAUD CREDITORS.

In Georgia a debtor may prefer one creditor over an other. Code of 1910, Section 3230, provides:

"A debtor may prefer one creditor to another, and to that end he may bona fide give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer choses

in action as collateral security, the surplus in such cases not being reserved for his own benefit."

A debtor, although insolvent, may prefer a creditor even for a past debt. In the case of Hale Berry Company 94 Ga. page 62, the 3rd head note is as follows:

> "While, by section 1953 of the code, a debtor, though insolvent, may give a lien by mortgage, or other legal means, or may transfer negotiable papers as collateral security, his insolvency precludes him from voluntarily assigning as mere security for a pre-existing debt anything which requires an assignment to pass the title, such as non-negotiable choses in action. * "

To the same effect is the case of Boykin 94 Ga. page 761 and the case of Lampkin 103 Ga. page 631.

The only limitation to this preference is contained in Section 3224 of the Code of 1910 and is as follows:

> "The following acts by debtors shall be fraudulent in law against creditors and others, and as to them null and void, viz.:
>
> 1. Every assignment or transfer by a debtor, insolvent at the time, of real or personal property, or choses in action of any description, to any person, either in trust or for the benefit of, or in behalf of, creditors, where any trust or benefit is reserved to the assignor or any person for him.
>
> 2. Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description, had or made with intention to delay or defraud creditors, and such intention known to the party taking. A bona fide transaction on a valuable consideration, and without notice or ground for reasonable suspicion, shall be valid."

Analyzing this Statute and applying it to the facts in the case it is apparent that the deed under consideration did not violate it for the following reasons:

1. J. N. Webb was not insolvent at the time he made the deed according to the evidence in the record. He thought he was solvent. The Bank thought he was solvent. It was held in the case of Bowers 215 F. R. page 617 that his liability as security on the papers of a solvent debtor could not be considered in determining whether or not he was solvent. The Webb & Crawford Company was evidently solvent then and they obtained $22000.00 from the Bank later.

2. If Webb was insolvent the deed was not "made with intention to delay or defraud creditors." The evidence is that Webb was individually borrowing the money, not to delay creditors, but to pay creditors of the Webb & Crawford Company. He was endeavoring to save the business corporation in which he was interested.

3. If Webb made the deed "with intention to delay or defraud creditors", such intention was not known to the Bank taking the deed.

There is no suggestion in the evidence that there was any purpose known to the Bank except the laudable purpose on the part of Webb to borrow money and pay creditors.

4. The transaction is admittedly a bona fide one and for a valuable consideration. Was there any notice or ground for reasonable suspicion? If so, of what? Apparently Webb owed no money. Apparently the Webb

& Crawford Company, while in debt, was perfectly solvent and the evidence shows that Webb represented the stock to be worth 75 cents in the dollar. See also Henderson, Trustee, 225 U. S. page 631 (56 L. E. 1233); Arthur Greey, Trustee, 231 U. S. page 511 (58 L. E. 339). In the last case the 3rd head note is as follows:

> "3. Successive assignments of accounts by way of security, in pursuance of a contract under which advances were made to enable the assignor to get the goods, on the faith of the undertaking that the accounts should be assigned, made without knowledge of the assignor's insolvency, and without conscious fraudulent intent, were not bad as against the bankrupt assignor's general creditors without lien because the contract embraced all accounts, and the lien thereunder was a secret one."

FRAUD.

In the case of Big Four Implement Company from the 8th Circuit Court of Appeals reported in the 207 F. R. page 535, it is held:

> "The mere failure to file contracts of conditional sale for record, although they are required to be filed by Statute to be valid against subsequent purchasers and certain classes of creditors, is not sufficient to show fraudulent intent."

In the case of Banks 207 F. R. page 662, it is held:

> "Prior to the filing of a petition in voluntary Bankruptcy, the Bankrupt is the owner of all his property and may sell and incumber it except in fraud of creditors or in violation of some provision of law."

In the case of Rutland Perry Company reported in the 205 F. R. page 200, it is held :

> "Bankr. Act July 1, 1898, c. 541, § 47a (2) Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which vests a trustee with the rights and powers of a creditor holding a lien by legal or equitable proceedings as to property in the custody of the court, was intended to preserve, but not to enlarge, the rights of creditors; and where under the state law a chattel mortgage, although unrecorded, is valid, except as against subsequent creditors without notice and prior creditors who have secured liens by attachment or levy, a trustee cannot hold property as against the holder of an unrecorded mortgage for the benefit of prior simple contract creditors."

In the case of Coder Trustee v. Arts reported in 213 U. S. 225 (53. L. E. 772). The 4th head note is as follows :

> "4. The necessary effect upon other creditors of a mortgage executed by an insolvent within four months of the filing of a petition in bankruptcy, to secure a pre-existing debt, does not dispense with the necessity of showing an actual intent on his part to hinder, delay, or defraud creditors, which is essential under the bankrupt Act of July 1, 1898, § 67e, in order to avoid such mortgage, where the mortgagee was ignorant of the insolvency of the mortgagor, and had no reason to believe that a preference was intended."

V.

THE ALLEGED AGREEMENT NOT TO RECORD THE DEED.

If we are correct in our conclusion that the deed in question was not made to delay or defraud creditors, or in our position that the statute of Georgia did not require it to be recorded, then whether or not there was an agreement not to record it is immaterial.

But the evidence on the subject does not justify the conclusion that there was such an agreement. J. N. Webb in his evidence (page 17 of the record) says:

"Q. Mr. Webb, state whether anything was said at the time about the record of this paper? The time of its execution?

A. My recollection is that Captain White and I had some conversation about it and it was agreed that if this paper went on record it would have a tendency to affect the credit of Webb & Crawford.

Q. Well, what about yours?

A. I don't remember.

Q. Did Captain White say whether he would or would not have the deed recorded?

A. My recollection is that he said he would not put it on the record."

It is apparent from this evidence:

1. That Webb does not swear positively as to any agreement not to record the deed.

2. That at most it was a voluntary promise on the part of White.

3. That it affected, if any one, the Webb & Crawford Company and not Webb.

On the other hand Captain James White, the Cashier, testified (on page 25 of the record) as follows:

"Q. What was said about recording the deed to him that day?

A. I don't think there was any question about it.

Q. You didn't record it—why didn't you?

A. I thought there was no special risk about it.

Q. Did you keep that deed off the record for the purpose of affecting any other creditor?

A. No, sir.

Q. Or for the purpose of deceiving anybody?

A. I didn't think anything of the sort. It was only a temporary loan and he had hopes of taking it up.

And on page 29 on cross examination Capt. White says:

Q. The transaction involved the giving of a deed that was handled by you, wasn't it?

A. Yes.

Q. You made the transaction?

A. Yes, sir.

Q. You say you didn't make an arrangement to withhold these deeds from record?

A. No, sir.

Q. Did he express a desire to keep them from the record?

A. No, sir. Nothing was said about it at all."

Thus it is seen that only two (2) witnesses testify as to the alleged agreement. Webb testifies as to his recollection merely. White testifies positively that there was nothing said about recording the deed.

Of course, Webb was in an embarrassing situation, and with all the pressure of his failure on him the best he could do, under the pressure of his other creditors,

was to testify that it was a recollection that the deed was not to be recorded. As against this indefinite answer there is:

1. The positive evidence of Jas. White.

2. The significant fact that J. N. Webb, as appears, from the record (page 24) in the evidence of J. J. Wilkins made the statement that the Webb & Crawford Company was worth Thirteen Thousand ($13,000.00) Dollars above all liabilities, when it turned out that this was more than one hundred thousand dollars in error.

3. The uncontradicted evidence of White shows that he expected the note to be paid in sixty (60) days, and that Webb was perfectly good, and there was no occasion to make any agreement about the record of the deed.

4. White left the transfer of the fire insurance policy to be attended to by Webb.

5. The evidence conclusive is that the failure to record the deed was a matter of neglect only.

If it had been agreed that the deed should not be recorded the same would still be valid as against the Trustee.

In the case of Dickinson, Trustee, vs. Stults, 120 Ga. p. 636, which was a contest between an unrecorded mortgage and the trustee in bankruptcy, the evidence was in part as follows:

> "That the mortgage was not recorded because it was understood that it would damage his sister's credit. 'Stults agreed to it'. 'There was no discussion between us as to when it should be recorded. Stults did not agree that it should never be recorded'. 'Stults had the only mortgage'. 'Mr. Stultz did not object to the mortgage going

on record, but I did not want it recorded'. 'There was no intention on my part to defraud any of (the) creditors. In the payment of these debts it was not my purpose to hinder, delay, defraud, or defeat the rights of other creditors'. The defendant was the only witness who testified in his behalf. He testified, in part, as follows: 'Sometime in the fall of 1899, I sold out my mercantile business in Bainbridge, Ga., to Miss I. T. Babbitt, and for the purchase-price I took notes of $100.00 each, and a mortgage on her house and lot in Bainbridge to secure the payment of the notes. Most of the notes were paid promptly; there was one past due when the stock of merchandise was sold to Mr. Cliett. I knew that Mr. Babbitt had been sick for some time prior to the sale of the Babbitt stock, but had no idea that the business was insolvent. I did not know who or what he owed, and had no reason to believe that I. T. Babbitt, for whom Mr. J. R. Babbitt was agent, did not have sufficient property to pay her debts, nor did I have any information as to what was owing to or paid to local creditors. I knew that Mr. Babbitt's sickness had prevented his giving his personal attention to his business, and I heard that Mr. Cliett would like to buy it, and told Mr. Babbitt about it, but did not suggest that he sell to Cliett. The mortgage on the house and lot which secured me was not recorded; I never agreed that it should not be recorded; I just failed to have it recorded * * * I knew after the stock of goods was sold to Cliett that Miss Babbitt had this house and lot and all her accounts left, and knew nothing to make me think that her other creditors would not be paid in full, if there were any.' Stults was the only creditor who had a mortgage."

Under these facts the Supreme Court of Georgia held that the mortgage was good under the recording act of that State as against a trustee in bankruptcy.

It was suggested in the argument of the case below that the deed in question was drawn by Mr. H. C. Tuck, and not by Cobb & Erwin, and that this was evidence of a purpose to conceal the transaction. The reply is that there was no evidence that Cobb & Erwin were the exclusive counsel for J. N. Webb. On the contrary Webb used other attorneys and especially Mr. E. K. Lumpkin as well as Tuck.

VI.

J. F. JACKSON AS A CREDITOR.

It is claimed by the Trustee, however, that J. F. Jackson has extended credit based on the absence of the record of the bank's deed, and, therefore, this deed is not good as to him. (Pg. 28 of record). There are two or three replies fatal to this contention.

1. It is apparent from the evidence that Jackson did not credit J. N. Webb in the sense in which that expression is used. What he did was to go security for the Webb, Crawford Co., and to sign a note of that Company with J. N. Webb as like security. He in no sense credited J. N. Webb. The Georgia National Bank loaned the money to The Webb, Crawford Co., based on a statement made by J. N. Webb as to its financial worth, and the note was signed by J. N. Webb and J. F. Jackson. This was in no sense a credit extended by Jackson to Webb, and, therefore, he is not in that category.

2. If Jackson, in fact did extend credit to Webb, this

would not change the law for the reason that he did not get a lien on the property, and under the Georgia statute it is only those creditors who acquire by contract a lien before the deed is recorded, who can complain. The fact that Jackson signed the note of the Webb & Crawford Co. with J. N. Webb, in no sense is a lien on the land. He is not in the attitude of a judgment creditor, nor a lien creditor by contract, and therefore, he is not concerned as to the record of the deed.

3. Jackson is estopped from attacking the bank's deed. Jackson took a second deed from Webb, reciting that it was second to this deed to the bank. (Page 45 of the record.) This recital would act as an estoppel on Jackson. In the case of Cruger, Trustee, reported in the 69th Ga. page 562, the court says:

> "A deed containing recitals of another deed is evidence of the recited deed against the grantor, and all persons claiming by title derived from him subsequently."

This doctrine has been recognized from the days of the common law and so far as I know without exception. Where a man takes a deed which recites a former deed he is estopped to deny the existence and validity of such deed. It is suggested that Jackson took this deed as the only thing that he could get. That may be true, but it does not change the rule of law. He had the right to refuse to take it if he wanted to, and to rely upon whatever rights he had, but he saw fit to accept it, and having accepted it he was then bound by the recitals of it, and bound by the deeds therein recited. This being true it is immaterial what Jackson did or did not do prior to going on the note of the Webb, Crawford Company.

VII.

JUDGMENT AND DECREE OF THE DISTRICT COURT AND CIRCUIT COURT.

The decree rendered (page 32 of the record) by the District Judge is based on three (3) concurrent errors: The material part of the opinion is as follows:

> "Under any view of the facts, assuming the testimony of Captain White to be true, and leaving out of view entirely the testimony of Webb, it seems clear that this instrument would be void and ineffective as against Jackson. He assumed the liability as indorser on the Webb & Crawford paper because he found no incumbrances against them, and says expressly that he would not have indorsed for them if he had found these incumbrances. It seems to me there is no law and no authorities anywhere under which the mortgage could be enforced against Jackson.
>
> If it is invalid as to Jackson, then under the decision of the Circuit Court of Appeals for this Circuit, in re Dugan, 183 Fed. 405, it would be void as to all the creditors. Other authorities might be cited, but I think the rule in the Dugan case must control as it was rendered by the Circuit Court of Appeals for this circuit."

1. The learned Judge assumes that J. F. Jackson was a creditor of J. N. Webb. The facts are, that he and J. N. Webb each signed a note of the Webb & Crawford Company, and he thereby became creditor if at all, of the Webb & Crawford Company, and not of J. N. Webb.

2. If Jackson should be treated as a creditor he is not a lien creditor, as already shown and cannot attack the

bank's deed. If he could not do so himself, the trustee could not do so for him.

A creditor who takes a lien or transfer has the right to rely on the records as to pre-existing liens or transfers, but when he endorses for another, or extends credit he takes the risk of any unrecorded deeds or liens that may exist. If he desires to know of these, his remedy is to make inquiry of the man whom he is crediting. It is only in cases where unrecorded transfers are fraudulent that a creditor without a lien can complain.

3. The third error of the learned Judge was the fact that he ruled that the case of Dugan 183 Federal page 405 was controlling. In that case the decision was predicated upon the proposition that a chattel mortgage had been kept off of the record fraudulently. That was a mortgage given by a trading concern, and the mortgagee testified as follows:

"Q. Why was it you took this $600.00 mortgage off record, canceled the record of this mortgage?

A. They told me that the mortgage I first put on was hurting their credit the minute it was put on—that is the one they telephoned me about.

Q. Why did you comply with their request about that?

A. From their first statement, and then having confidence in their standing and in their solvency, knowing them I kept it then off record. I thought they would comply with their promise to give me partial payments until when it was due, the second one I had written. It would be liquidated before it was due while I made the second one the 15th of October, but before they executed it, before it was ever drawn up, they had made me a promise to pay me so

much every month that before the 15th the balance of it would have been paid up.

Q. Your object, then, in canceling the first mortgage and taking a new one, was to extend their credit, give them a better credit than they would have had if it had remained on record?

A. From their statement I did, to accommodate them.

Q. That was your object in doing that?

A. Yes, sir.

Q. You knew if you didn't do it, their credit would be ruined?

A. From their statement and to accommodate them and by their statement is the reason I accommodated them, took it off and took a new one.

Q. They told you that putting that first mortgage on record was ruining their credit.

A. Yes sir.

Q. And that no wholesaler would sell them as long as it was on record?

A. Yes, sir."

The Court held under those facts that the mortgage was fraudulent, and, of course, if so it was a nullity and did not affect any creditor. In the case at bar, Webb was not a trader. The deed was not fraudulent, and if the deed had been void as to Jackson, upon the ground that he extended credit after searching the records it would not affect any other creditor.

The opinion of the Circuit Court appears in so far as material is in these words:

> "The evidence in this case tends strongly to show that although the mortgage given by the bankrupt to the appellant was for a valid consideration and effective as between the parties thereto, the same by understanding, if not agreement,

was withheld from record so as not to affect the mortgagor's credit; and we therefore concur with the trial Judge in his disposition of the case.

The decree appealed from is affirmed."

The learned Court's conclusion that the deed was withheld from record so as not to affect the mortgagor's credit is error for the following reasons:

J. N. Webb (on page 17 of the record) in an indirect sort of way testified as to the effect of the record of the deed on the credit of Webb & Crawford Co. He does not testify as to his own credit. He said, "My recollection is that Capt. White and I had some conversation about it, and it was agreed that if this paper went on record it would have a tendency to affect the credit of Webb & Crawford." This indefinite testimony is squarely contradicted by positive evidence of White.

2. If the facts were as recited by the learned Court of Appeals this would not render the deed void as decided in the Dickinson case 120 Ga. 632 already cited.

3. Since the law of Georgia does not require a deed to be recorded to be valid as against any creditor, except one obtaining a lien by contract, the agreement, if made, would not invalidate the deed.

VIII.

ATTORNEYS FEES.

It is insisted by the Trustee however, that if the bank is entitled to recover the money, that it is not entitled to recover attorney's fees. I confess I am unable to see upon what grounds the Trustee predicated this claim. Under the repeated ruling of the Supreme Court of

Georgia, the attorneys' fees becomes part of the principal. (Baxter 69 Ga. 587). When Webb gave the note to the Bank, he agreed by authority of the law to pay 10 per cent. of principal and interest as attorneys' fees, provided the note was not paid on, or before, the return day for the suit of which he had notice. That was a contract which was binding both upon Webb and the Bank. I submit that the bankrupt law or any decision under it, which controvenes this contract would be unconstitutional and void. Neither the Congress nor the State Legislature could pass a law, which would render void the contract made. The evidence in this case shows that the Bank complied literally with the State statute on the subject. That is to say gave Webb the notice and filed the suit, and that Webb did not pay the note on or before the return day, the time when the suit was filed. This being true, under the statute and decisions of Georgia, that became a part of the principal of that note, and if the bank is entitled to recover anything, it is entitled to recover the whole. The fact that courts have held that interest would not accumulate beyond the time of bankruptcy could play no part in it. Indeed I don't think that is a legal holding. The contract provides that the debt shall bear interest and being a contract made within the law, the bankrupt law could not change it under the constitution.

Under any view of this case, it seems to me, that the Bank's debt is a valid one; the money was loaned and deed taken at the time; the consideration was a present one. No creditor has obtained any lien on the same prop-

erty. The deed was recorded before the petition for bankruptcy was filed. The debt is an honest one without any suggestion of fraud, or any purpose on the part of the bank to delay and hinder any other creditor, and the same should be paid, and a decree should be rendered providing that when the property is sold that the bank's judgment be paid in full including principal and interest and attorneys' fees and the decision of the court below should be reversed with such direction.

IX.

CONCLUSION.

The National Bank of Athens is one among the oldest in the South. Capt. Jas. White, the Cashier, has been such for nearly fifty years. He has financed most of the enterprises of the city. J. N. Webb was the ruling Officer of the Webb & Crawford Company and stood as high, until his failure, as any man in the city. To people who know them it is unthinkable that either would be a party to a fraud.

The memory of White, like that of most elderly men, is inclined to repose. It no longer obtrusively asserts itself. It permits the mind to rest. It encourages relaxation. It recognizes its owner has reached that age where "He shall rise up at the voice of the bird", and it disturbs him not. "Badness of memory every one complains of, but nobody of the want of judgment."

When Capt. White loaned Mr. Webb the $12,000.00

for sixty (60) days and took the deed in question to secure the same he doubtless felt it was unnecessary to record the same then as the debt would be paid when due. The deed was laid aside, and memory did not refer to the same again until aroused by the failure of Webb & Crawford Co. on August 13, 1912. "Mistakes remembered are not faults forgot". The failure to record the deed is attributable solely to these facts. The Bank furnished the cash for the deed. The money went to increase the assets of Webb and ultimately the assets of the Webb & Crawford Company. This was not a transaction to secure past indebtedness, but it was the exchange of a deed for the cash. It was the violation of no law; it was in good faith and should be upheld, and the decision of the District Court and of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

JNO. J. STRICKLAND,
Attorney for Appellant.

JNO. J. & ROY M. STRICKLAND,
Of Counsel.

[redacted]

No. [redacted]

In the Supreme Court of the United States

October Term, 1914

The National Bank of Athens,
Appellant,

vs.

F. C. [redacted],

Appeal from the [redacted]

LIST OF CASES CITED
IN MAIN AND REPLY BRIEFS.

Dugan, 183 Fed. 405.
General Order in Bankruptcy No. 36.
Hobbs 231 U. S. Page 692 (58 L. E. p. 540).
Section 24a of The Bankrupt Act.
Section 60b of the Bankrupt Act.
Paragraph 67d of The Bankrupt Act.
National Bk. of Newport v. Nat. Herkimer Co. Bk. 225 U. S. p. 178, (56 L. E. 1042).
Section 60 of The Bankrupt Act, as amended by Act of Feb. 5, 1903.
Watson, 201 Fed. 962.
Dupree v. Watson 116 Fed. Rep. p. 483.
Robert Van Iderstine, Tr. v. Nat. Disc. Co. 227 U. S. 575 (57 L. E. 652).
Holt, Tr. 224 U. S. 264 (56 L. E. 757).
Section 47a of The Bankrupt Act, as amended in 1910.
Collier on Bankruptcy 9th Ed. p. 659.
Code of Georgia of 1910, Par. 3306.
Code of Georgia of 1910, Par. 6038.
Nat. Bk. of Athens, 80 Ga. p. 56.
Code of Georgia of 1910 Par. 3320.
Bailey v. Bailey, 93 Ga. p. 768.
Donovan 96 Ga. p. 340.
Acts of Ga. of 1889, p. 106.
Henderson 128 Ga. p. 811.
Smith, 10 Ga. App. p. 282.
Griffin, 98 Ga. p. 475.
Jones, 99 Ga. p. 457.
New South Bldg. & Loan Assc., 101 Ga. p. 679.
Hester v. Young, 2 Ga. 45.
Lytle, 107 Ga. p. 388.
White v. B. & L. Ass'n, 106 Ga. p. 146.
Knapp, 216 U. S. 545 (54 L. E. 610).
Section 70a of the Bankrupt Act.
Dickinson, Trustee, 120 Ga. p. 632.
Boyd, 213 F. R. p. 774.

Social Circle Cotton Mills, 113 F. R. p. 994.
Davis, et. al., 210 F. R. p. 768.
Holt v. Henley, Trustee, 232 U. S. 637 (58 L. E. 767).
Scruggs, 205 F. R. p. 674.
East End Mantel & Tile Co., 202 F. R. p. 275.
Wall, 207 F. R. p. 994.
Lane Lbr. Co., 210 F. R. p. 82.
Anderson, 208 F. R. p. 401.
Code of Georgia of 1910, Sec. 3230.
Hale Berry Co. 94 Ga. p. 62.
Boykin, 94 Ga. 761.
Lampkin, 103 Ga. p. 631.
Code of Georgia of 1910, Sec. 3224.
Bowers, 215 F. R. p. 617.
Henderson, Trustee, 225 U. S. p. 631 (56 L. E. 1233).
Arthur Greey, Trustee, 231 U. S. p. 511 (58 L. E. 339).
Big Four Implement Co., 207 F. R. p. 535.
Banks, 207 F. R. p. 662.
Rutland Perry Co. 205 F. R. p. 200.
Coder, Trustee, v. Arts, 213 U. S. 225 (53 L. E. 772).
Section 67e of the Bankrupt Act.
Cruger, Trustee, 69 Ga. p. 562.
Baxter, 59 Ga. 587.
Robinson, 80 Ga. 249.
Cottrell & Sons v. Merchants, etc. 89 Ga. 515.
Blennerhassett v. Sherman 105 U. S. 100.
Davis v. Schwartz 155 U. S. 631 (39 L. E. 289).
Covington v. Brigman 210 F. R. 506.
Town of Louisville 104 U. S. 469.
Pusser 132 Ga. 284.
Cambridge Tile Co. 137 Ga. 281.
Jarvis 59 Ga. 232.
Groves 69 Ga. 614.
Swift 92 Ga. 796.
Simpson 114 Ga. 207.
Southern Iron & Equipment Co. 138 Ga 258.
Cabot v. Armstrong 100 Ga. 438.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1914.
No. 317.

THE NATIONAL BANK OF ATHENS, Appellant,
vs.
F. C. SHACKELFORD, Trustee in Bankruptcy, Appellee.

REPLY BRIEF FOR APPELLANT.

MOTION TO DISMISS.

The Appellee in his motion to dismiss predicates the same upon the proposition that the case in hand did not present "controversies arising in bankruptcy proceedings", but was steps arising in bankruptcy proceeding.

The facts are that J. N. WEBB had made a first deed to Appellant (page 40) and a second deed to J. F. Jackson (page 45) and a third deed to Mrs. S. A. Webb who was in possession and is still. When the Trustee filed his bill to enjoin the National Bank's proceeding in the State Courts, the bank then filed an answer in the nature of an intervention praying that its deed be established as a first lien on the property of the bankrupt and satisfied out of the proceeds of the sale (page 10-11). This brings the case within the ruling of this court, in the cases of Knapp, Trustee 216 U. S. 545 and Greey, Trustee 231 U. S. 514, and of Hobbs 231 U. S. 692.

The remaining grounds of the motion are not founded in law or fact except as to reducing the evidence to nar-

rative. This was not done. It could not have been done without destroying its import. Neither side wanted it done. When the record was being made up for the appeal, counsel for all parties came together and agreed on all the record and the evidence to be sent up (page 71 of the record). Paragraph 5 of that agreement stipulated that "The stenographer's report of evidence in full had at the trial of said case including stipulations of counsel". The attorneys at that time, not being familiar with new rule 75, all thought this agreement sufficient, and hence the Judge was not asked for an order directing the questions and answers sent up.

If in fact there was anything in this ground of the motion the Trustee, having agreed for this evidence to go up in this shape, would now be estopped from objecting to the form of the evidence.

CASES CITED BY ATTORNEYS FOR APPELLEE.

Dickenson vs. Stults, 120 Ga. 632 (page 11 of brief).

The second head note of this case is predicated upon the following facts and opinion:

> "In the present case, only one witness was introduced by the plaintiff. This witness was J. R. Babbitt, the brother of the bankrupt, who conducted her business and acted for her when the notes and mortgage were given to Stults and when the stock of goods was sold and the notes and mortgage satisfied. He testified, in part, as follows: That the mortgage was not recorded because it was understood that it would damage his sister's credit. 'Stults agreed to it. There was no discussion between us as to when it should be recorded. Stults did not agree that it should never be recorded'. 'Stults had the only mort-

gage'. 'Mr. Stults did not object to the mortgage going on record, but I did not want it recorded'. 'There was no intention on my part to defraud any of (the) creditors. In the payment of these debts it was not my purpose to hinder, delay, defraud, or defeat the rights of other creditors'. The defendant was the only witness who testified in his behalf. He testified, in part, as follows: 'Some time in the fall of 1899, I sold out my mercantile business in Bainbridge, Ga., to Miss I. T. Babbitt and for the purchase-price I took notes of $100 each, and a mortgage on her house and lot in Bainbridge to secure the payment of the notes. Most of the notes were paid promptly; there was one past due when the stock of merchandise was sold to Mr. Cliett. I knew that Mr. Babbitt had been sick for some time prior to the sale of the Babbitt stock, but had no idea that the business was insolvent. I did not know who or what he owed, and had no reason to believe that I. T. Babbitt, for whom Mr. J. R. Babbitt was agent, did not have sufficient property to pay her debts, nor did I have any information as to what was owing to or paid to local creditors. I knew that Mr. Babbitt's sickness had prevented his giving his personal attention to his business, and I heard that Mr. Cliett would like to buy it, and told Mr. Babbitt about it, but did not suggest that he sell to Cliett. The mortgage on the house and lot which secured me was not recorded; I never agreed that it should not be recorded; I just failed to have it recorded. * * * I knew after the stock of goods was sold to Cliett that Miss Babbitt had this house and lot and all her accounts left, and knew nothing to make me think that her other creditors would not be paid in full, if there

were any'. Stults was the only creditor who had a mortgage. There was no evidence that the debt of Bradley & Co., or the debt of any other creditor represented by the trustee, was created after the execution of the mortgage, nor did it appear that there were any claims superior to Stults' mortgage."

What the effect would have been had the debts been created after the mortgage is not decided. The court, however, quotes with approval the decision in case of Robinson 80 Ga. 249 as follows:

"It was error to charge as matter of law, that if the jury believed that the debtor made the mortgages attacked, and there was an understanding with the persons receiving them that they should be kept off the records, for the purpose of protecting his financial credit, then they would be fraudulent as to all persons extending credit to the debtor after that date. It is for the jury to say what the intention was, and whether the mortgages were given by the debtor for the purpose of hindering, delaying or defrauding his creditors. If they should find that such was the intention of the debtor, still it would not affect the mortgagee, unless such intention was known to him, or without notice or grounds for reasonable suspicion".

Cottrell & Sons v. Merchants, etc. 89 Ga. 515 (page 11 of brief).

This case was dealing with a paper executed prior to the recording act of 1889, and the point decided is contained in the first head note, which is in these words:

"The retention of title by the vendor in a

written contract of sale of personal property with the condition affixed that the title is to remain in the vendor until the purchase price shall have been paid, though the instrument be not recorded within the time prescribed by law, will prevail over the lien of a subsequent mortgage on the same property, executed by the conditional vendee to a creditor who gives credit and takes the mortgage without notice of the vendor's title, the mortgage also not being recorded in time". By Statute, bills of sale or reservation of title to personalty are controlled as to record by the law for mortgages. Southern Iron Co. 138 Ga. 264.

Blennerhassett v. Sherman 105 U. S. 100. (Page 11 of brief).

This case is where the mortgage was made to hinder and delay creditors which facts were known to the mortgagee. The head notes are as follows:

"1. A mortgage executed by an insolvent mortgagor, and covering his entire estate, to his creditor, who knows of his insolvency, and who, for the purpose of giving him a ficticious credit, conceals the mortgage and withholds it from the record, and represents the mortgagor as having a large estate and unlimited credit, by which means the latter is enabled to contract other debts which he cannot pay, is void at common law.

2. A mortgage executed by an insolvent debtor with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent, and knows it to be made in fraud of the provisions of bankrupt Act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from the record

for two months, is void under the Bankrupt Act, although executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor".

Davis vs. Schwartz 155 U. S. 631 (39 L. E. 289) (page 12 of brief).

The gist of this case is contained in the second head note which is in these words:

"Where a mortgage is given in good faith and for a valuable consideration the mortgage is not invalidated because the mortgagee intended to obtain a preference, or is a relative or friend of the mortgagor, or the mortgage hinders other creditors, if not given to defraud them, or the execution of the mortgage was immediately followed by a delivery of possession of the mortgaged property".

Covington vs. Brigman 210 F. R. 506 (Page 12 of brief).

This is a case of actual fraud, and it is predicated upon the Duggan case 183 F. R. 405.

All the other cases cited at bottom of page 12 and top of page 13 of the brief are cases of actual fraud. The Georgia cases cited on page 13 and 14 are cases of actual fraud. These decisions were all prior to the recording act of 1889, and do not deal with it or this case.

FRACTIONS OF A DAY.

Appellee, on page 14 of his brief, quotes from the 104 U. S. page 469 as follows:

"The law does not, in general, take cognizance

of the fractions of a day; but the Courts may do so when substantial justice requires it."

A statute of a State making provisions for it would certainly be a case where the Courts "may do so." In the State of Georgia the levying of attachments, the serving of garnishments, the filing for record of deeds, mortgages,and fi fas,all take their priorities by the hour, or the minute when service is made or filing had. The Federal Courts recognize the State Statutes as to filing as well as recording, and where the State law recognizes the fractions of a day, the Federal Courts will do so.

NATURE OF INSTRUMENT.

On page 15 of Appellee's brief he cites the case of Pusser 132 Ga. 284 upon the proposition that the Bank's deed, though a warranty deed in form, was in reality a mortgage. By examining this case it will be seen that the only thing decided was that a deed made in fact to secure a note, and the note has become barred, the deed may be enforced as an Equitable mortgage. This in no way affects the question at bar. The Statute of Georgia, Paragraph 3306 (See page 19 of Appellant's brief) expressly provides that such a deed passes title.

CAMBRIDGE TILE CO. VS. SCAIFE & SONS CO. 137 GA. 281.

Appellee cites the above case in support of the proposition that a judgment rendered before the recording of a prior mortgage is superior to the lien of the mortgage. He loses sight of the fact that in Georgia a mortgage does not pass title while a deed to secure a debt does. When the creditor obtained his judgment he could levy on the mortgaged property whether the mortgage was

recorded or not, but if a deed had been made to secure a debt he could not levy on it. This has been decided frequently, and among others, in the cases of

Jarvis 59 Ga. 232.
Groves 69 Ga. 614.
Swift 92 Ga. 796.
Simpson 114 Ga. 207.

On page 18 of Appellee's brief he cites a lot of authorities on the proposition that a judgment is good against an unrecorded bill of sale. These are all predicated upon the Statute which he quotes as to conditional bills of sale. The case of Southern Iron & Equipment Company, 138 Ga. 258, expressly rules that a bill of sale is subject to the law of a mortgage as to record. It is not controlled by the recording act of 1889, and hence the authorities do not touch the question.

CABOT VS. ARMSTRONG. 100 GA. 438.

In this case the Court was dealing with the Statute as it existed prior to the Recording Act of 1889. The decision expressly in the body says that it is controlled by the Acts of 1884-5 page 124, which requires that such papers "shall be recorded within thirty days from their date". And further provides:

> "Such deeds or bills of sale, not recorded within the time required, remain valid against the person executing them but are postponed to all liens created or obtained, or purchases made prior to the actual record of the deed or bill of sale".

Of course, under that Statute, an unrecorded deed was postponed to a judgment.

The cases cited on page 19 of Appellees's brief are again dealing with a bill of sale to personalty which is

controlled by its special Statute and is like a mortgage.

The reasoning and authorities of Appellee on pages 21, 22, and 23 of his brief are mythological and not based on the evidence in the case. His suggestion that the renewed note was the securing of a past debt is in the teeth of the evidence that the deed in question was made when the original loan was obtained, and that the same debt had continued to exist, but evidenced by notes renewed from time to time.

The argument of Appellee on pages 24 and 25 of his brief, in so far as it deals with the question of the Federal Court retaining and disposing of the property, we do not deem necessary to notice, in as much as there is no question as to this under the pleadings in the case. The main brief of Appellant deals with the attorneys' fees.

On page 26 the Appellee lays down the proposition that, the District Court and The Circuit Court of Appeals, both having found against the Appellant, therefore this Court should do likewise. Stating his proposition differently, granting that the District Court erred, the Circuit Court of Appeals erred, two errors should beget a ruling which, though in line, would not be error. We realize that the presumption is in favor of the judgment of each Court below, but realize also that the purpose of a Court of last resort is to correct errors and not to follow them.

Respectfully submitted,

JNO. J. STRICKLAND,
Attorney for Appellant.

JNO. J. & ROY M. STRICKLAND,
Of Counsel.

[redacted]

No. [redacted] 40

In the Supreme Court of the United States

October Term, 1914

The National Bank of Athens,

Appellant,

vs.

F. C. Stackelford, Trustee in Bankruptcy for J. N. Webb

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit

---

Supplemental Brief

[redacted]

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1914.

No. 317.

THE NATIONAL BANK OF ATHENS, Appellant,
vs.
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb.

SUPPLEMENTAL BRIEF.

On page 42 of the original brief for Plaintiff in Error, the following propositions and authorities should appear:

> "The general rule of law is that a recital of one deed in another binds the parties and those who claim under them by matters subsequent. Technically speaking such a recital operates as an estoppel, which works on the interest in the land, and binds parties and privies; privies in blood; privies in estate and privies in law."
>
> Crane vs. Morris et. al., 6 Peters' 598 (8th L. E. p. 514.)
>
> Carver vs. Jackson, 4th Peters' p. 1. (7th L. E. p. 761.)

In the middle of page 17 of the original brief after the word "Registration", and before the words "In the case of Holt" should appear the following: In the case of Floyd Scott Co. decided by the District Court of Massachusetts, reported in the 224 F. R. page 987, the two head notes which are well supported by the opinion, are as follows:—

1. "Bankruptcy—191—Preferences—Lien for rent—Necessity of Recording lease.

A lease, giving a landlord a lien for the rent on property on the leased premises, under the law of Rhode Island, created an equitable lien, good as against creditors, though the lease was not recorded; and hence, though it was recorded a few days before bankruptcy, when the lessor had reasonable cause to believe that the lessee was insolvent, and that the lien claimed would constitute a preference, the lien did not amount to a voidable preference.

2. Bankruptcy—151—Rights of Trustee—Application of State Law.

Under Bankr. Act July 1, 1898, c. 541, 47a (2) 30 Stat. 557, as amended by Act June 25, 1910, c. 412, 8, 36 Stat. 840 (comp. St. 1913, 9631), giving a trustee, as to all property coming into the custody of the bankruptcy court, all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the trustee's rights depend upon the law of the State, as the "rights of a creditor holding a lien by legal or equitable proceedings" are essentially a matter of state law.

In the case of the First National Bank of Albany vs. Hamblin, reported in the 224 F. R. page 739, the headnotes bearing on the question before the court are as follows:

"3. Bankruptcy, 172—Mortgage by Bankrupt—Validity—Recordation.

Real Property Law N. Y. (Laws 1896 c. 547) 241, declares that mortgages may be recorded, and, if not recorded, shall be void as against any subsequent purchaser in good faith and for a

valuable consideration whose conveyance is first recorded. A mortgage, given by a bankrupt for a valuable consideration more than four months before the filing of the petition in bankruptcy, was not recorded. Held, that such mortgage was valid as against the trustee in bankruptcy; he not being a subsequent purchaser in good faith.

4. Bankruptcy—175—Conveyance—Fraud of Creditors.

Failure to record a New York mortgage is not, as to general creditors, a badge or indicia of fraud; the statute authorizing recordation not being for their protection.

5. Bankruptcy—178—Mortgage by Bankrupt—Validity—Bona Fides.

A mortgage, given by one subsequently bankrupt, held intended to be valid and to be part of a transaction whereby he secured indorsers of his note.

6. Bankruptcy—308—Conveyance by Bankrupt—Mortgages—Validity.

Evidence held insufficient to show that mortgagees who indorsed a note of one subsequently bankrupt and received the mortgage as security knew of his insolvency, or were guilty of any fraud in agreeing not to record the instrument.

7. Bankruptcy—181—Preferences—What Constitutes.

Where one subsequently bankrupt, to obtain a loan, gave a mortgage to persons who indorsed his note, such mortgage is not a voidable preference within Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562) 60b, as amended by Act Feb. 5, 1903, c. 487, 13, 32 Stat. 799, and Act June 25, 1910, c. 412, 11, 36 Stat. 842 (Comp. St.

1913, 9644); for a transfer, to constitute such a preference, must be on account of a pre-existing debt.

8. Bankruptcy—184—Fraudulent Conveyances—Validity.

Where one subsequently Bankrupt, to procure persons to endorse his note, gave them a mortgage, and they agreed as a favor to him not to record it, the mortgage was not invalid as a fraudulent conveyance, though Real Property Law N. Y. (Consol. Laws, c. 50) 263-266, declares void conveyances fraudulently intended to hinder or delay creditors, it not appearing that the indorsers intended to withhold the instrument from record so as to defraud creditors, and there being no duty requiring them to record the instrument.

9. Bankruptcy—172—Conveyances—Enforcement.

Where a mortgage which had not been promptly recorded was valid in the hands of a mortgagee who had indorsed a bankrupt's note to a bank, the bank, though it knew of the mortgagor's insolvency and of the delay in recording the mortgage, at the time of taking it over, may take over and enforce the conveyance."

It will be observed that this court held that an agreement not to record the mortgage would not render it invalid where it did not appear that this agreement was made to hinder or delay creditors.

At the top of page 28 of the brief for Plaintiff in Error, and just before the second division on that page should appear the following:

In the case of In re Virgin reported in the 224 F. R. page 128, Judge Speer, District Judge of Georgia,

recognized the doctrine insisted on in this case by Plaintiff in Error, and after so doing on page 131 he says:

> "Nor does the amendment to the Bankruptcy Law of 1910, which clothed the trustee with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings (paragraph 47a, as amended) change the status. The trustee could not have any lien of any sort before he became trustee, and before that date the mortgage was recorded, and is therefore prior to any lien this amendment created. See In re Jacobson & Perrill (D. C.) 200 Fed. 812. There it was held:
>
> 'The lien of a bankrupt's trustee conferred by the Bankruptcy Act as amended in 1910 does not relate back to a period four months prior to the institution of bankruptcy proceedings, nor can it antedate the institution of such proceedings.'
>
> See, also, Keeble v. John Deere Plow Co., 190 Fed. 1019, 111 C. C. A. 668.
>
> And again by the Circuit Court of Appeals for the Fifth Circuit, it was held:
>
> 'Where the morgage was given for a valid consideration, and not to hinder, delay, or defraud the creditors, and not having been withheld from record with fraudulent intent, and having been recorded before the lien of the bankrupt's trustee attached, it was valid against him.' Anderson v. Chenault, 208, Fed. 400, 125, C. C. A. 616."

In the case of Brown Wagon Company also decided by Judge Speer, and reported in the 224 F. R. page 266 he again recognizes the doctrine. The head notes are as follows:

> "1. Bankruptcy—140—Unsecured Creditors—Conditional Sales—Validity—Record.

Under Code Ga. 1910, 3319, providing that conditional sales must be recorded within 30 days from their date, and in other respects shall be governed by the laws as to the registration of mortgages, and section 3260, providing that mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained prior to actual record, the record of a conditional sale within 30 days is not necessary as against unsecured creditors of the buyer.

2. Bankruptcy—140—Preferences—Contract of Conditional Sale—Record.

Under Bankr. Act. July 1, 1898, c. 541, 30 Stat. 557, 47, as amended by Act. June 25, 1910, c. 412, 8, 36 Stat. 840 (Comp. St. 1913, 9631), giving the trustee the rights of a judgment creditor, the lien of a bankrupt's trustee has no priority over a claim under a contract of conditional sale, executed in good faith prior to the 4-months period, but recorded within that time; but the claim under the conditional sale contract is to be allowed as a secured claim against the fund arising from the sale of the particular machinery specified in such contract."

Respectfully submitted,

JNO. J. STRICKLAND,
Attorney for Appellant.

JNO. J. & ROY M. STRICKLAND,
Of Counsel.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1932

NO. [redacted]

NATIONAL BANK OF ATHENS,

Appellant,

vs.

P. C. S. SHACKELFORD, TRUSTEE OF BANKRUPTCY
FOR J. M. WEBB,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO DISMISS AND AFFIRM
AND BRIEF OF APPELLEE P. C. SHACKELFORD,
TRUSTEE.

Appellee's Counsel: Douglas C. Green,
Howard C. Green, Counsel for Appellee,
P. C. Shackelford, Trustee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 317.

THE NATIONAL BANK OF ATHENS, Appellant,

versus

F. C. SHACKELFORD, TRUSTEE IN BANKRUPTCY FOR J. N. WEBB.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO DISMISS APPEAL AND TO AFFIRM DECREE.

Andrew J. Cobb, Horace M. Holden, Stephen C. Upson, Howell C. Erwin, Lamar C. Rucker, Counsel for Appellee,

F. C. Shackelford, Trustee.

And now comes the appellee, F. C. Shackelford, Trustee for J. N. Webb, bankrupt, in the above entitled cause, by his counsel in that behalf, and moves the Court to dismiss the appeal in the above entitled cause for the want of jurisdiction and because the record of appeal is informal, irregular, and insufficient for the following grounds and reasons, to-wit:

FIRST GROUND.

For that the jurisdiction of the Bankruptcy Court was invoked for the determination of the rights of Trustee of the estate of J. N. Webb, bankrupt, to administer said real estate property in question, free from the interference of Appellant's

suit in the City Court of Athens, which was brought therein subsequent to the adjudication of bankruptcy and to the appointment and qualification of said Trustee, and was for the purpose of obtaining a special judgment in said City Court of Athens against said real estate in question, which was at the time of the filing of the petition in bankruptcy in the actual and physical possession of J. N. Webb and passed into the custody of the Court of Bankruptcy and of F. C. Shackelford, the Receiver, who became subsequently the Trustee of said estate. (See pages 2, 3, 4 and 5, transcript of record). Said proceedings in bankruptcy involving the questions of Trustee's right to administer said property free from interference and to prevent the said creditor from obtaining a special lien against said property in the State Court after the exclusive jurisdiction of the Court of Bankruptcy had attached to the property in question, which was in custodia legis at the time said suit was filed in the said City Court of Athens, and the determination of the questions in said proceedings in bankruptcy being the right to obtain the injunction prayed against said suit then pending in the City Court of Athens, the right to administer said property and to sell same free of the special lien, which was attempted to be set up in said suit in the City Court of Athens, and were questions that could be reviewed only by a petition to superintend and revise as a matter of law the proceedings had in said bankruptcy matter, and were not appealable; because they were not controversies arising in bankruptcy proceedings, but were steps arising in bankruptcy proceedings for the due orderly administration of said bankrupt estate in regular course under provisions of said Bankruptcy Act.

SECOND GROUND.

And on the ground that said questions decided on said petition filed by the Trustee in said District Court sitting as a Court of Bankruptcy, seeking an injunction against the suit brought by the Appellant in the City Court of Athens to obtain a special judgment lien, including attorney's fees against the real estate in question (See pages 1, 2, 3, 4 and 5 transcript of record), were steps in a proceeding in bankruptcy for administrative orders, seeking to stop the unlawful interference by said creditor with administration of the estate in bankruptcy by the said Trus-

tee, and the questions involved were only appealable as bankruptcy proceedings in the Court of Bankruptcy under section 25 of the Bankrupt Act and were not controversies in bankruptcy proceedings under section 24 of the Brankruptcy Act, and being only appealable under Section 25-(a).

That said record of appeal shows that the final judgment of the Circuit Court of Appeals for the Fifth Circuit—the court below—does not contain the findings of fact and conclusions of law as required by General Order in Bankruptcy XXXVL, in that, clause 3of said General Order reads as follows:

"In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, on or before the time entering its judgment or decree, make and find a findings of the facts, and its conclusions of law, thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

And it appearing from the transcript of said record that the court below did not make the findings of fact and conclusions of law as required by Rule 36-(3), said appeal should be dismissed.

RENEWAL OF MOTIONS TO DISMISS THE APPEAL MADE IN THE COURT BELOW.

Now comes the Appellee, and renews his motion to dismiss the appeal from the District Court to the Circuit Court of Appeals for the Fifth Circuit, on the grounds as set forth in the transcript of the record on pages 61, 62, 63, 64, 65, 66, 67 and 68.

MOTION TO AFFIRM DECREE.

Appellee also moves the Court to affirm the judgments of the Circuit Court of Appeals for the Fifth Circuit, and the District Court, the two courts below, upon the ground that there is nothing in the transcript of the record which shows that any error was made by said courts, and in the absence thereof the judgments of the courts below should be affirmed.

ARGUMENT.

The petition for injunction against the suit in the City Court of Athens invoked the jurisdiction of the Court of Bankrupty for an order to provide for the due administration by the Trustee for the bankrupt estate, free from the interference of the suit brought by the National Bank of Athens, which sought to obtain a lien and to tax 10% attorneys' fees against the property, which was then in the custody of the Court of Bankruptcy, which had exclusive jurisdiction over the subject matter, and was "proceedings in bankruptcy," and not a "controversy in bankruptcy" between the Trustee and the said National Bank of Athens.

Coder v. Arts
213 U. S. 223
22 Am. B. R. 1.
Tefft, Weller & Co. v. Munsuri,
222 U. S. 114,
In Re. Loving 224 U. S. 183, 27 Am. B. R. 852.

The questions involved were largely those of law, and not of fact, and should have been brought up for review from the lower court of the Fifth Circuit by a petition to superintend and revise as a matter of law under Section 24-(b).

Elliott v. Toeppner
187 U. S. 27
9 Am. B. R. 50,
Loan & Trust Co. v. Graham,
14 Am. B. R. 316
135 Fed. 417,
In Re. Loving
224 U. S. 183
27 Am. B. R. 852,
Barnes v. Pampel
27 Am. B. R. 195
192 Fed. 525.

If the case was appealable it was only so under Section 25-(a).

In Re. Loving
224 U. S. 183
27 Am. B. R. 852,
Coder v. Arts
213 U. S. 223.

The transcript of record showing that the final judgment of the Circuit Court of Appeals does not contain the findings of facts and conclusions of law as required by General Order

36-(3), and the case being appealable only under Section 25-(a) of the Bankrupt Act, the appeal should be on motion dismissed.

Chapman, Trustee, v. Bowen
207 U. S. 89
18 Am. B. R., 844.

MOTION RENEWED AS TO MOTION FILED IN COURT BELOW.

Trustee calls attention to motions filed in the court below to dismiss the appeal (p. 61, 62, 63, 64, 65, 66, 67, and 68), and contends that said grounds, upon a consideration of the record of this appeal, should be considered favorably, and that said motions should be granted.

On the 1st, 2nd, 3rd, 4th and 5th grounds of the motion to dismiss (p. 61, 62 and 63 of record) Trustee cites the following cases, in favor of the motion:

Webber et al, v. Mihills, et al,
124 Fed. 64,
Frame v. Portland Gold Mine Co.,
108 Fed. 750.

And because the testimony was not reduced to narrative form, as required by Rules 75, Rules of Practice in the Courts of Equity for the United States, effective Feb. 1st, 1913.

And for grounds of motion contained on pages 64, 65, 66, 67 and 68 of record, the Trustee relies upon the following authorities, to-wit:

Railroad v. Cutting
68 Fed. 586,
McFarlane v. Golling,
76 Fed. 23,
New York Dry Goods Co. vs. Pabst Brew, Co.
112 Fed. 38.

Respectfully submitted,

F. C. Rockford
Appellee.
Frank M. Holden
Stephen C. Peterson
Howell C. Erwin
Lamar C. Rucker
Solicitors.

Todd Erwin & Rucker
Holden Rockford & Meadow
of Counsel for appellee.

To Messrs. John J. and Roy M. Strickland,
Solicitors for Appelant,
Athens, Ga.

Gentlemen:—

Please take notice that on the next motion day of said court, at which the foregoing motions can be heard, that same will be submitted, together with the annexed argument thereon, and we shall then and there move said court for an order dismissing the appeal on the grounds and for the reasons therein stated, and for other reasons which are apparent upon the face of said papers, and we shall then and there move for an order to affirm the decree of the court below.

Annexed hereto is a copy of said motion, and of the brief of argument thereon.

F. C. Shackelford
Appellee.
Hoke M. Holden
Stephen C. Upson
Howell C. Erwin
Lamar C. Rucker

Cobb, Erwin and Rucker,
Holden, Shackelford & Meadow,
of Counsel.

Solicitors for Appellee.

Service of the foregoing notice acknowledged, copies of the motion and argument annexed thereto received.

Dated at Athens, Ga. on this the 19th day of April, A. D., 1915.

Jno J Strickland
Solicitors for Appellant.

Copy)

IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM, 1914.

NO. [redacted] 40

NATIONAL BANK OF ATHENS,

Appellant,

versus

F. C. SHACKELFORD, TRUSTEE IN BANKRUPTCY FOR J. R. WEBB,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF APPELLEE, F. C. SHACKELFORD, TRUSTEE.

Horace M. Holden, Stephen C. Upson, Howell C. Erwin, Lamar C. Rucker, Counsel for Appellee.

F. C. Shackelford, Trustee.

Cobb, Erwin & Rucker, Holden, Shackelford & Meador, of Counsel.

INDEX.

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Corwine vs. Thompson Bank, 105 Fed. 196.
Carter vs. Hallahan, 61 Ga. 314.
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Dickenson vs. Stults, 120 Ga. 632.
In re Duggan, 183 Fed. 405.
Davis vs. Schwartz, 155 U. S. 631.
Dulaney vs. Morse, 29 A. B. R. 275.
In re Dismal Swamp Co., 14 A. B. R. 175.
In re Farmers Co-operative Co. 30 A. B. R. 187.
Globe Bank Co. vs. Martin, 35 Sup. Ct. Rep. 377.
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In re Weiland, 28 A. B. R. 620.

IN THE UNITED STATES SUPREME COURT.
OCTOBER TERM, 1914.

NO. 317.

NATIONAL BANK OF ATHENS,

Appellant,

versus

F. C. SHACKELFORD, TRUSTEE IN BANKRUPTCY, FOR J. N. WEBB,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR APPELLEE, F. C. SHACKELFORD, TRUSTEE.

STATEMENT.

Counsel for appellee ask leave to present this concise abstract or statement of the case, presenting succinctly the questions involved, because the statement given in the brief of counsel for appellant does not clearly show the steps taken in the litigation in the order in which they arose, nor does it present the questions involved in the manner as required by Rule XXIV.

An involuntary petition in bankruptcy was filed in the Clerk's office of the Court below, at 9:15 P. M., August 14th, 1912. (P. 47 of record). On the same date, a petition for the appointment of a receiver was filed in the Clerk's office below, as a Court of Bankruptcy. (P. 50 of record).

On August 16th, 1912, an order was made appointing F. C. Shackelford, Esq., custodian for all money, property and effects

of the said Jos. N. Webb, alleged bankrupt. (P. 51 of record). Custodian's bond approved by Referee, and filed in Clerk's office August 16th, 1912. (P. 52 of record). On August 31st, 1912, Jos. N. Webb was adjudged bankrupt. (P. 49 of record). On October 19th, 1912, bond of F. C. Shackelford, trustee of Jos. N. Webb, bankrupt, was filed in office. (P. 39 of record).

F. C. Shackelford, receiver, took charge of bankrupt's property and proceeded to administer same under the orders of the Court of Bankruptcy, and succeeded himself as trustee.

The National Bank of Athens, appellant, brought suit to the November term, 1912, of the City Court of Athens against said Jos. N. Webb, in which suit they sought to obtain a general judgment for $12,000.00 with interest, on a certain note, also 10 per cent of principal and interest, as attorney fees thereon, and also a special judgment against certain real estate in the City of Athens, Ga., described in a deed conveying the said real estate to the said bank to secure said note. (P. 5 of record).

The real estate in question was in the actual possession of Jos. N. Webb at the time the involuntary petition in bankruptcy was filed against him, and at the time the receiver in bankruptcy took charge of all his money, property and effects on August 16th, 1912. It remained in the custody of the Court of Bankruptcy through its receiver, F. C. Shackelford, until he succeeded himself as trustee in bankruptcy on October 19th, 1912, and the trutsee was in possession of the property when the above mentioned suit was filed against Jos. N. Webb, in the City Court of Athens. (P. 19 of record).

On November 16th, 1912, the trustee brought a petition entitled, "In the matter of Jos. N. Webb, bankrupt, in Bankruptcy No. 318," to the District Court below, sitting as a Court of Banruptcy, in which petition the above mentioned facts, among others, were duly set forth and it was averred by the trustee that the property of the bankrupt in question, located on Prince Avenue, in the City of Athens, was in his possession on the 29th day of October, 1912, the date the National Bank of Athens brought the above mentioned suit in the City Court of Athens. (Pages 2and 3 of record). And in his petition, said trustee averred that the Court of Bankruptcy had the possession of the property through him as trustee, and that said Court of Bankruptcy had exclusive jurisdiction to administer all claims against

the same, and prayed that the suit be perpetually enjoined, and that the Bank be required to set up in the Court of Bankruptcy, any claims it might have to the real estate, and that a restraining order be issued until a hearing could be had, and this petition was positively verified by an affidavit of the trustee annexed thereto. (Pages 5 and 6 of record).

On this petition, his Honor, Wm. T. Newman, District Judge, granted a restraining order and set the case down for a hearing on November 23rd, 1912. (P. 7 of record).

Up to this stage, the steps taken had been for the preservation of the property as part of the estate of the bankrupt, and for the due and proper administration of the property under the exclusive jurisdiction of the Court of Bankruptcy, and were steps in bankruptcy proceedings, and were so entitled.

The National Bank of Athens responded to the show cause order and filed a response which was in the nature of, and was a cross-bill in equity, in which cross-bill, the Bank prayed:

(1) "That F. C. Shackelford, trustee, be restrained from prosecuting his application for order to sell the land described in the petition of this case, until further order of this Court, and that he eventually be perpetually enjoined.

(2) "That it be decreed by this Court that there is no interest in the property described in the petition to be administered by F. C. Shackelford, trustee.

(3) "That it be decreed that defendant's deed is a valid lien against said property for the amount of its debt, with interest and attorney's fees, and cost.

(4) "That defendant have such other and further relief as it is entitled to under the facts in this case, and it will ever pray, etc.

(5) "That the restraining order be issued by the Clerk." (P. 8 of record).

On this cross-bill, his Honor, Wm. T. Newman, Judge of the District Court below, granted a show cause order against F. C. Shackelford, trustee, and fixed March 1st, 1913, as date for hearing thereon. (P. 12 of record).

In answer to this cross-bill, the trustee filed an amendment to his original petition, in which he attacked the deed held by the Bank as being void and invalid as against the trustee and the creditors represented by him, of the said Jos. N. Webb, bankrupt, because said deed had been withheld by the Bank from record from the date of its execution, to-wit, November 6th, 1911, until

the 14th day of August, 1912, for the purpose of preserving the credit of the said Jos. N. Webb, who was then in a failing and insolvent condition, pursuant to an express agreement between Jas. White, the Cashier and Managing Officer of the said National Bank of Athens, and the said Jos. N. Webb, and for the purpose of preserving the credit of Webb & Crawford Co., a corporation in which said Jos. N. Webb was a large stockholder and its Managing Officer, and which corporation was largely indebted to the said Bank, and because the withholding of said security deed from record was a legal fraud upon the creditors of said Jos. N. Webb, and that a considerable amount of indebtedness due by said Jos. N. Webb was created after the execution and delivery of said security deed and prior to the record thereof, and upon the faith of the apparent clear and unincumbered ownership of said real estate being in said Jos. N. Webb, and because the withholding of said security deed from record for the period of time referred to, was a legal fraud upon all the creditors of said Webb and particularly upon one or more of said creditors, to-wit: Jack F. Jackson, who before crediting the said Webb, and before becoming a joint endorser with the said Webb on the paper of the Webb & Crawford Co., examined the tax records and the records in the office of the Clerk of the Superior Court of Clarke County, with a view of ascertaining whether or not there were any liens or incumbrances against any of the property of the said Webb, and finding the records clear of any such liens or incumbrances, and the property in controversy appearing upon the tax books in the name of said Jos. N. Webb, did then extend credit to the said Jos. N. Webb, and become co-surety with him upon the obligation of the Webb & Crawford Co. It was further alleged in said petition as follows:

"That said security deed was filed for record in the office of the Clerk of the Superior Court of Clarke County on the same day that the involuntary proceeding in bankruptcy was filed against the said J. N. Webb that on the day preceding said day, to-wit, on the 13th day of August, 1912, an involuntary proceeding in bankruptcy had been filed against the Webb & Crawford Company, a corporation in which the said J. N. Webb was a large stockholder, and upon whose obligations the said Webb was known by the said bank and its officials to be endorser to a considerable amount, and it being known and understood by said National Bank of Athens and its managing officer that the

failure and insolvency of said Webb & Crawford Company would precipitate the failure and insolvency of the said J. N. Webb." (Pages 12 and 13 of record).

This amendment was positively verified, and after being duly allowed, was filed in Clerk's office. (P. 14 of record). It was an amendment to the original petition, which in addition to containing a prayer for specific relief, contained prayers for "such other and further relief as the nature of the case and the principles of equity and justice may require." (P. 5 of record).

To this answer and amendment filed by the trustee to the cross-bill, the Bank filed an answer in the nature of a general denial, with motions to strike allegations, because immaterial and insufficient. (Pages 14 and 15 of record).

The cause came on to be heard before the Judge of the Court below, on June 18th, 1913, at which hearing evidence was adduced by the trustee and by the Bank in support of their respective contentions, and witnesses were examined orally before the Court, and on July 17th, 1913, an opinion was filed by the Judge in which he held that the deed held by the Bank was invalid, void and ineffective as against Jackson and as against all the creditors of the bankrupt's estate, and their trustee in bankruptcy, and that the Bank must stand as a general creditor of the bankrupt's estate. (P. 33 of record). And a decree taken was entered up and filed on July 19th, 1913, in which it was ordered, adjudged and decreed: (1) That the Bank's suit in the City Court of Athens be enjoined; (2) That the deed held by the Bank was void against general creditors; (3) That the property involved in the litigation be administered by F. C. Shackelford, trustee, free from the claim fo the Bank. (That the Bank pay the cost of the proceedings). (P. 33 of record).

Upon the trial of the case, the trustee introduced evidence to show *among other things* that at the time the deed attacked was executed, J. N. Webb and Webb & Crawford Company were insolvent and have been insolvent ever since that time; that at the time the deed attacked was made, there was an express agreement between Capt. White, the Cashier and General Manager of the Bank and Mr. Webb,—that the deed should be withheld from record; that the purpose of this agreement was to preserve and bolster up the credit of Mr. Webb and the Webb & Crawford Company and that the failure to record this deed had this effect;

that Mr. Jackson endorsed a note of the Webb & Crawford Company with Mr. Webb, and that before doing so, he examined the records in the Clerk's office to see whether or not there were any incumbrances against the property of Mr. Webb and found none, and that he would not have endorsed said note if he had known of the existence of the deed attacked by the trustee; that the note endorsed by said Webb and Jackson has never been paid by said Webb or the Webb & Crawford Company, and that said Jackson will sustain a loss for the reason of said endorsement; said note has been paid off by said Jackson and has been proved in the Webb & Crawford Company bankruptcy proceedings. (P. 2 of record).

John J. Wilkins extended credit to Mr. Webb on the strength of the reputed and apparent unincumbered ownership by him of the property conveyed by the deed attacked; that he would not have extended such credit, had he known of the existence of said deed; that other parties during the period that the deed was withheld from record, extended credit to the amount of over $56,000.00. (P. 24 of record).

Appellee upon the trial of the case, contended *among other things* that there was an express or tacit agreement between Mr. Webb and Capt. White, Cashier of the Bank, to withhold the deed attacked from record, but if no such agreement was made the fact that the deed was actually withheld from record and that credit was extended to Webb, (and the Webb & Crawford Company by other creditors, on the faith of the property being owned by Webb unincumbered, on whose obligation Webb was endorser) vitiated the deed as to these creditors, and that if the deed was void as to any on creditor, it was void as to all, and the trustee should administer the property for the benefit of all the creditors unincumbered by said deed.

Appellee further contended *among other things* that the trustee, under the amendment of 1910 to the Bankruptcy Act, took the property as a judgment creditor would have taken it on the date of the filing of the involuntary petition in bankruptcy, and that under the statutes of Georgia a judgment creditor has a lien superior to that of a mortgage or security deed unrecorded at the time the judgment is rendered, and that there being no fraction of a day, and the security deed being filed for record on the same day that the petition for involuntary bankruptcy

was filed, the trustee took title to the proprty unincumbered by the security deed.

BRIEF OF THE ARGUMENT.

FACTS DISCUSSED.

1.

Jos. N. Webb, the bankrupt, and hereinafter called such, was manager of the Webb & Crawford Company, a corporation engaged in the wholesale grocery business, at Athens, Georgia, and hereinafter called the Company. This company carried an account with the National Bank of Athens, hereinafter called the Bank. The bankrupt did not carry an individual account with the bank.

On or about November 6th, 1911, the company was overdrawn at the bank, and there was at the bank, out-of-town drafts on the company that it desired to take care of, but did not have the money to do so with. Under these circumstances, the bankrupt negotiated with the bank for a loan of $12,000.00 for which he gave his individual note, and as security for the note, gave a deed to his home place on Prince Avenue, Athens, Georgia. The money obtained by the loan was placed by the bank to the credit of the company. The bankrupt swears that it was expressly agreed that the deed should be withheld from record, because to put it on record, would affect the financial credit of the company and the bankrupt. Captain White, Cashier of the Bank, who testified on this point, said that "he didn't think that there was anything said about keeping it off the record," that "when he found out that the Webb & Crawford Company had failed, which was on August 13th, he did put it on record," which was August 14th; that he did "not make any agreement to withhold the deed from record." As a matter of fact, the deed was withheld from record from November 6th, 1911, to August 14th, 1912, a period of nine months and eight days. (Pages 16 to 20 of record).

During this period, two creditors of the bankrupt, viz., Jack F. Jackson and Jno. J. Wilkins, swore positively, that they extended credit to the bankrupt on the strength of the reputed and apparent ownership by him, free and unincumbered of the

property transferred by the deed in question; and that they would not have extended credit, had they known of the existence of the deed in question. Each of these creditors had made a loan of $5,000.00. (Pages 21 to 26 of record).

The evidence further shows, that other parties, during the period that the deed was withheld from record, extended credit in the sum of $56,100.00. (See stipulation Pages 53 to 56).

The bankrupt scheduled that he was indbeted to secured creditors, in the sum of $53,366.34, to unsecured creditors, in the sum of $123,674.14. The bankrupt's property that has been sold, for the sum of $11,454.00, and was bought in by Mrs. Lucas, who held a first lien on the property, and was only sufficient to satisfy her lien. (See pages 52 to 55 of record).

There remains to be sold of the bankrupt's property, excluding certain holding of bank stock and coca-cola stock, which are pledged to secure debts amounting to more than the value of the pledge; the home place on Prince Avenue. It is obvious that if the trustee is successful in this litigation, that this property when sold for its fair market value of $15,000.00, will not allow but a small dividend to be declared on the indebtedness of the estate, which amounts to $165,774.14 as shown by the schedules.

This indebtedness of the bankrupt arose from his endorsement of the company's paper, the larger portion of which was incurred prior to November 6th, 1911, but all of it was renewed since that date, and the renewals, it can be fairly argued, would never have been agreed to, had these creditors known of the existence of the bank's secret lien.

The debtor's schedules of Webb & Crawford Company show that that bankrupt corporation owes $243,661.49; its principal assets consisting of his stock of groceries, store fixtures, notes and accounts, and live stock sold by the trustee for $25,212.68. Two dividends, one for 10 per cent and one for 5 per cent, has been paid on this heavy indebtedness. There remains to be sold only the store and warehouse property, on which the bank also holds a secret lien, which it withheld from record and did not record until after bankruptcy, in the sum of $30,000.00. The stated consideration in the face of the deed; though Capt. White testified that the bank's claim was only $23,100.00. (Pages 52 to 55 and page 25 of record).

On the question of "good faith" between the grantor, grantee

and creditors, the fact that this deed was withheld from record and the fact that its stated consideration is some $9,000.00 more than the actual debt claimed, bears strongly on the intent and purpose of the contracting parties, which was that the bank in case of financial troubles, should be amply secured, not only for existing indebtedness but for future loans, so that other creditors, should this agreement be allowed to stand, will get but a small pro rata dividend out of the company's bankrupt estate.

BRIEF OF ARGUMENT ON POINTS OF LAW.

I.

Under the rulings of the Georgia Supreme Court the failure to record a deed rendered the same void as to creditors who subsequently extended credit to Webb on the faith of his owning the property unencumbered.

Dickens vs. Stults, 120 Ga. 632.

In the second headnote it appears that an unrecorded mortgage was upheld because none of the creditors extended credit after the date of the mortgage.

In Cottrell vs. Merchants Bank, 89 Ga. 515, the court says:

"It may be said that the object of record is to notify subsequent purchasers or creditors of the prior claim, and thus save them from being mislead by the appearance of ownership resulting from possession; that the plaintiffs, by failing to record, put it in the power of the party in possession to effect a fraud, and therefore they ought to bear the loss. This reasoning applies as well to mortgagees, who in Georgia usually leave the mortgagor in possession, as to vendors by conditional sale."

As to subsequent creditors extending credit on the faith of Webb's owning the property unencumbered, the deed is void, and being void as to one, should be set aside and the property administered equally among all the creditors.

In re Duggan, 25 A. B. R. 479, 183 Fed. 405.

This doctrine has recently been promulgated by this Honorable Court in Globe Bank & Trust Company vs. Martin, Volume 35, Supreme Court Reporter, page 377.

AGREEMENT TO WITHHOLD FROM RECORD.

II.

The United States Supreme Court in Blennerhassett, vs. Sherman, 105 U. S. 100, held that where a mortgage on real estate

was withheld because the recording of it would impair the credit of the mortgager and of the firm wherein he was senior partner, such mortgage would be void where credit was extended to the mortgagor on the apparent ownership by him of valuable property to which the mortgage attached. The Court herein declared that the mortgage was a fraud upon the creditors of the mortgagor, and, therefore, void by common law and without regards to provisions of the Bankrupt Act. The Court further held that it was not sufficient that the mortgage was supported by a valuable consideration, but that it must also be bona fide. Numerous decisions are cited which will not be set out. It further held that the effect of the arrangement not to record the mortgage, though it may not have originated in any actual fraudulent or evil purpose, was to secrete from the public eye the true condition of the debtor, and thereby enable him, under the semblance of being the owner of unencumbered real estate, to deceive by inducing them upon the faith of his supposed unencumbered condition to give credit which otherwise would have been withheld. Such contrivances, though not designed to perpetrate an actual fraud upon other persons, have an inevitable tendency that way and are obviously opposed to the general policy of the law requiring the public registration of all liens and encumbrances upon property permitted to be retained and claimed by the debtor. In conclusion it was said that nothwithstanding that the mortgage had been executed beyond the bankrupt period within which preferences were void, the fact that it had been kept off registration was against the spirit of the Bankrupt Act and was void for that reason. This is the leading case upon the subject and has been cited so often that it would be laborious to even note the cases dependent thereupon.

In Davis vs. Schwartz, 155 U. S. 631, 14 L. Ed. 240, this Court held again that a good consideration alone would not validate such a transaction; that where a mortgage was given and withheld from record in order to give the mortgagor a fictitious credit it would be held void as against creditors.

The principles herein enumerated are relied upon as controlling the numerous decisions of the lower Federal courts.

Covington vs. Brigman, 210 Fed. 506,
Peterson vs. Mettler, 198 Fed. 941,
Orr vs. Park, 183 Fed. 688,

In re Hickerson, 162 Fed. 354,
Thomas vs. Fletcher, 153 Fed. 228,
Mitchell vs. Mitchell, 147 Fed. 280,
In re Shaw, 146 Fed. 279,
Rogers vs. Page, 140 Fed. 606,
In re Hunt, 139 Fed. 291,
In re Noel, 137 Fed. 702.

The Blennerhassett case does not seem to appear again in the Supreme Court Reports, but it is distinguished in principle from the case of Thompson vs. Fairbanks, 196 U. S. 521, and on page 308 of the 25th Supreme Court Reporter.

"The bankrupt was, therefore, not holding himself out as unconditional owner of the property and there was no securing of credit by reason of his apparent unconditional ownership."

The Circuit Court of Appeals for this Circuit in re Duggan, 183 Fed. 405, 25 A. B. R. 479, held, upon facts much less strong than those in this record, that there was an agreement to withhold a mortgage from record between the parties and that under the Georgia law, which is set out in Section 3224 of the Code of Georgia for 1910, the said mortgage was void both as to prior and subsequent creditors.

In another case from this Circuit, Clayton vs. Exchange Bank, 10 A. B. R. 173, the Court of Appeals held that a mortgage not at first fraudulent might become so by concealment, as thereby third persons might be induced to give credit. This is but, of course, the Blennerhassett case. In this case several Georgia cases are cited, which will be briefly noted.

In Robinson vs. Woodmansee, 80 Ga. 249, the State Supreme Court held that it was a jury fact whether the failure to record the mortgage was an intended fraud against subsequent creditors.

In Smith vs. McDonald, 25 Ga. 379, it was said that where a vendor made an absolute conveyance and continued in possession this was a badge of fraud as against creditors; that this badge existed as against existing and subsequent creditors; that the latter may be supposed to have given credit on the faith of the apparent ownership of the property.

In Phinizy vs. Clark, 62 Ga. 623, it was held that such a conveyance not only needed a good consideration, but must be pure. It must be made with no purpose known to or suspected by the creditor to hamper and entangle the property as against other creditors for the sake of hindering or delaying them.

Court of Appeals of Georgia in several decisions that a judgment has priority over an unrecorded mortgage, even though the judgment creditor has notice of the existence of the unrecorded mortgage before the judgment is rendered.

In the case of Cambridge Tile Company vs. Scaife & Sons Company, 137 Ga. 281, the second headnote and the headnote a. under the second headnote are as follows:

"2. The lien of a judgment rendered before the recording of a prior mortgage is superior to the lien of the mortgage (Civil Code, Sec. 3260), though at the time of the rendition of the judgment a petition to foreclose the mortgage (on realty) has been filed and a rule nisi has been issued thereon and served. Richards v. Myers, 63 Ga. 763; Benson v. Green, 80 Ga. 230 (4 S. E. 851); New England, etc. Co. v. Ober, 84 Ga. 294 (10 S. E. 625); Cabot v. Armstrong, 100 Ga. 438 (3), 442 (28 S. E. 123). In such a case notice, actual or constructive, to the judgment creditor, at the time when the judgment was rendered, of the existence of the unrecorded mortgage, is immaterial. Burke v. Anderson, 40 Ga. 540; Cottrell v. Bank, 89 Ga. 517 (15 S. E. 944).

(a) A mortgage was executed January 7, 1908, on land of the mortgagor situated in a county other than that of his residence. A petition to foreclose was filed February 15, 1909. The mortgage was recorded September 20, 1909. An execution on the foreclosure was issued on February 28, 1910, and recorded, in the county where issued, on March 2, 1910. A common-law judgment in favor of another creditor of the mortgagor was rendered against him, in the county of his residence, on April 7, 1909, and the execution issued thereon was entered upon the general execution docket of that county May 31, 1909. Held, that, under the ruling just above announced, the lien of the common-law judgment was superior to the lien of the mortgage; and that the trial judge erred in holding that the mortgagee's claim to a fund arising from the sale of the mortgaged land was superior to the claim of the judgment creditor, and in awarding the fund to the mortgagee."

The same ruling was made in the following decisions:

Richards vs. Myers, 63 Ga. 762,
New England Mortgage Security Co. vs. Ober, 84 Ga. 294.
Thompson vs. Morgan, 82 Ga. 548,
Barkley vs. May, 3rd Ga. App. 101-105.

It being true that a judgment has priority over an unrecorded mortgage, it follows that a judgment would have priority over an unrecorded deed to secure a debt, for the reason that the language of the section of the Code with reference to the effect of

the failure to record a mortgage is substantially the same as the section of the Code with reference to the effect of the failure to record a deed to secure a debt.

Section 3260 of the Civil Code of Georgia (1910) is as follows:

"EFFECT OF FAILURE TO RECORD. Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage. If, however, the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded mortgage, or the purchaser has the like notice, then the lien of the older mortgage shall be held good against them."

Section 3306 is as follows:

"ABSOLUTE DEEDS AND NOT MORTGAGES. Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said vendor any money or to secure any other debt, and shall take a bond to titles back to said vendor upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale and take an obligation binding the person to whom said property is conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass the title of said property to the vendee till the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts of this State to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and not a mortgage."

Section 3307 is as follows:

"RECORD OF SUCH DEEDS. Every such deed shall be recorded in the county where the land conveyed lies; every such bill of sale, in the county where the maker resided at the time of its execution, if a resident of this State. If a non-resident, then in the county where the personalty conveyed is. Such deeds or bills of sale not recorded remain valid against the persons executing them, but are postponed to all liens created or obtained, or purchases made, prior to the actual record of the deed or bill of sale. If, however, the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded deed or bill of sale, or if the purchaser has the like notice, then the title conveyed by the older deed or bill of sale shall be held good against them."

It will be observed from reading the sections of the Code of Georgia above quoted that the effect of the failure to record a

We call special attention to the case of Corwine vs. Thompson Bank, 105 Fed. 196, in its application of the Blennerhassett case.

In this connection attention of the Court is called to the testimony of John J. Wilkins, appearing on page 24 of the record. It should be considered in connection with the testimony of Jackson and others as to the extension of credit. Wilkins, as an individual and as president of two banks, extended credit on the faith of Webb's apparent ownership of the property.

The record shows that after the deed was made many others than Jackson and Wilkins extended credit to Webb & Crawford Company on its notes endorsed by J. N. Webb. (See record pages 53, 54 and 55). Many extended credit directly to J. N. Webb. (See pages 56 and 57).

It is fair to assume that creditors extended credit on the faith of this apparent ownership.

Smith vs. McDonald, 25 Ga. 380, citing among others the case of Sexton vs. Wheaton, 8th Wheaton, pages 228 and 252.

III.

FRACTIONS OF DAY.

DEED RECORDED BEFORE PETITION FILED.

"The law does not in general take cognizance of the fractions of a day; but the courts may do so when substantial justice requires it."

Town of Louisville vs. Portsmouth Savings Bank,
114 U. S., 469, 26 L. Ed. 775.

The Federal Courts do not recognize the fractions of a day in the enforcement of the Bankrupt Law.

Moore, vs. Third Nat'l Bank of Philadelphia,
24 A. B. R. 568.

In this case is cited Collier on Bankruptcy (6th Ed.) page 332. Here the rule is stated as of ancient standing.

In this case is also cited Long's Appeal, 23 Pa. 297, wherein the court says:

"Neither necessity nor justice requires that one creditor should be aided in seizing all the assets of his debtor to the entire exclusion of others equally meritorious."

IV.

NATURE OF INSTRUMENT.

A deed absolute on its face may be shown by parol testimony to be only a deed to secure a debt.

Carter vs. Hallahan, 61 Ga. 314,
Hester vs. Gairdner, 128 Ga. 531,
Pusser vs. Thompson, 132 Ga. 284.

In Alter vs. Clark, 193 Fed. 153, (District Court Nevada) it was held:

"Where absolute deeds of certain real estate were executed solely to secure repayments for certain loans made by the grantee to the grantors, the property to be held by the deeds were mortgages."

In Booth, 96 Fed. Reporter, 943, U. S. District Court of the Northern District of Georgia, the court held that where a deed was given to secure a debt it would be held to be an equitable mortgage; that a suit in the State Court to foreclose this lien would be enjoined by the Bankrupt Court so as to have the property sold by the Bankrupt Court to preserve the equity above the mortgage.

It will be seen from the rulings above quoted made by the Federal Courts and from the decisions of the Supreme Court of Georgia hereinbefore cited, and especially in the case of Pusser vs. Thompson, 132 Ga. 284, that a deed, though absolute on its face, if really made only for the purpose of securing a debt, is an equitable mortgage.

V.

We wish to bring to the attention of the Court the fact that under the statutes of Georgia the lien of a judgment has priority over a deed to secure a debt given by the defendant in such judgment, but not recorded until after such judgment has been rendered, in view of the position taken by counsel for appellant in their brief, and especially in view of the statement on page 22 of the brief of such counsel, as follows:

"The lien by judgment, being not by contract, is postponed to a deed though unrecorded."

and other statements in the brief of such counsel on pages 24 and 27.

It has been ruled by the Supreme Court of Georgia and the

mortgage is the same as the effect of the failure to record a deed to secure a debt, in so far as the liens of judgments against the mortgagor are concerned.

Section 3319 is as follows:

"How RECORDED. Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages."

It has been held that a judgment against the maker of a conditional bill of sale will take precedence over the bill of sale if unrecorded.

See: Shaw vs. Renfroe, 11 App. 807-808,
Cottrell vs. Merchants Bank, 89 Ga. 508, 517 and 518,
Phillips & Crew Co. vs. Drake, 13 App. 764, 765, 766.

Section 3270 provides that when the debt to secure which a mortgage was given has been paid, the record of such mortgage may be cancelled as specified in said section, and Section 3309 provides that when the debt to secure which a security deed was given has been paid, the record of such deed may be cancelled in substantially the same manner as is provided for the cancellation of the record of a mortgage in section 3270.

In Cabot vs. Armstrong, 100 Ga. 438, the third headnote is as follows:

"3. While an absolute deed executed in 1887 for the purpose of securing a debt passed title to the grantee, yet if such deed was not recorded within thirty days from its date, it was postponed to the lien of a judgment against the grantor obtained after the execution of the deed and before the actual record of the same."

On pages 443 and 444 Chief Justice Simmons in the opinion of the Court says.

"If that is true, the deed of September 13, 1887, was not merely a deed of bargain and sale but a deed given to secure a debt. Therefore, the agreement did not make it a security deed from the date of the agreement, but it was a security deed from the time it was executed and delivered. The act of 1885 requiring that all deeds to realty given as security for debt should be recorded within thirty days from their date, and that if not so recorded they are postponed to all liens created or obtained prior to the actual record of the deed, this deed not having been so recorded, and the judgment of Geraty & Armstrong having been obtained after the execution of the deed but before its record, this judgment takes precedence of the unrecorded deed."

In the decision of the court in the case of Cabot vs. Armstrong, supra, it has been expressly ruled by the Supreme Court of Georgia that a judgment has priority over an unrecorded deed. This is true even though the execution issuing upon the judgment is not filed or entered upon the execution docket, under the provisions of the sections of the Code of Georgia referred to in the brief of counsel for appellant.

In the case of Phillips & Crew Company vs. Drake, 13 App. 764, the only headnote is as follows:

"Where personal property is delivered under a contract of conditional sale, and afterwards and before the contract has been recorded a judgment against the purchaser is obtained by a third person, the lien of the judgment has priority over the vendor's unrecorded reservation of title."

On pages 765 and 766 Chief Judge Russell says:

"A judgment creditor whose lien is obtained before the conditional sale is made is not one of the third persons referred to in section 3318 of the Civil Code. If, however, his lien is acquired after the conditional sale is made, he does come within the terms of that section of the Code. While the debt upon which the judgment is founded was not created upon the faith of the debtor's apparent unconditional ownership of the property, still the lien was obtained at a time when the possession of the debtor furnished presumptive evidence of ownership, and it is for this reason that the judgment lien takes priority. The fact that the execution which issued upon the judgment was not recorded upon the general execution docket of the county in which the judgment was rendered would make no difference. As against third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the defendant's property, a money judgment against him would not be a lien upon his property from the rendition thereof, unless the execution issuing thereon be entered upon the docket within ten days from the time of its rendition; and if not entered within ten days the lien dates from the time of such entry of the execution. Civil Code, Sec. 3321. This section, however, has no application in the present case. The plaintiff in error is not in the position of one who acquires title on the faith of the defendant's apparent unincumbered ownership without notice of the judgment lien. Having sold the property to the defendant and delivered it over into his possession without recording its contract of conditional sale, it took the risk of creditors of the defendant acquiring a lien against the property."

VI.

By virtue of the amendment of 1910 of the Bankruptcy Law the trustee takes the property of the bankrupt with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.

In Collier on Bankruptcy (9th Ed.) on page 942 the following appears:

"(3) EFFECT OF AMENDMENT OF SEC. 47-a (2) BY AMENDMENT OF 1910. Section 47-a (2) as amended by the act of 1910 should be construed with sub-section b of this section. It is there provided that the trustee 'as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.' The purpose and effect of this amendment has already been considered. This amendment effectually disposes of any doubt which may have existed as to the right of a trustee to proceed as a judgment creditor against conveyances invalid for failure to record or file, or because of fraud as against creditors."

Under the authorities below, we think it is well established that the trustee takes the property of the bankrupt as would a judgment creditor under seizure by reason of a levy by virtue of such judgment *as of date of the filing of the petition to have the debtor adjudicated a bankrupt.*

See: 2 Remington on Bankruptcy (2nd Ed.) sec. 1270 2/10, pages 1122 and 1123.

Supporting this text are:

Keeble vs. John Deere Plow Co., 190 Fed. Rep. 1019,
In re Jacobson & Perrill, 29 A. B. R. 603,
Big Four Co. vs. Wright, 31 A. B. R. 128,
In re Farmers Co-Operative Co. 30 A. B. R. 187,
Hart vs. Emmerson, 30 A. B. R. 218.

VII.

Our contention is that an unrecorded deed to secure a debt is postponed to a judgment against the grantor, as we have undertaken to demonstrate under paragraph 6 of this brief, and that the trustee in bankruptcy takes the property of the bankrupt as a judgment creditor as of the date of filing of the petition to have the debtor adjudicated a bankrupt, as we have undertaken to demonstrate in paragraph 7 of this brief.

The deed by Webb to the bank to secure a debt was filed for

record on the day the petition to have Webb adjudicated a bankrupt was filed, but prior to the time of the filing of the petition. Our contention is that the filing of the deed for record had effect only from the exact time of the day it was filed for record, but that a judgment rendered on that day would have effect from the beginning of that day, and that as the trustee took the property as a judgment creditor as of date of the filing of the petition to have Webb adjudicated a bankrupt, his right to the property takes precedence over the rights of the bank under the security deed.

In considering this question we wish to call the attention of the Court to the fact that under the laws of Georgia a judgment takes precedence over an unrecorded deed to secure a debt, even though an execution issuing upon the judgment was never recorded upon the execution docket.

In the case of Phillips & Crew Company vs. Drake, 13 App. 764, wherein it was ruled that a judgment takes precedence over an unrecorded contract of conditional sale, it is said:

"The fact that the execution which issued upon the judgment was not recorded upon the general execution docket of the county in which the judgment was rendered would make no difference."

VIII.

THE DEED IN QUESTION A PREFERENCE.

The trustee further contends that the deed in question is a voidable preferncee; because, at the time of its actual delivery, the bankrupt was hopelessly and notoriously insolvent, which insolvency was well known to the bank; and at the time of its actual delivery the bank received the deed in question with full knowledge that the effect of such a transfer would be to enable it to obtain a greater percentage on its debt than any other creditor of the same class; its debt being then an antecedent one.

The evidence shows that the bank made to the bankrupt a loan of $12,000.00 on a sixty-day note, which note was renewed at its expiration, or re-discounted at its expiration up to July 6th, the date of the note now held by the bank as evidencing the original debt; contemporaneously with the taking of the first sixty-day note the bank obtained the deed in question, which is in form a warranty deed. It is not the usual form of security

as taken when a party wishes to pass title to real estate as security for a debt.

The deed in question was withheld from the record; the evidence shows that it was withheld from record by agreement. Under this state of facts it is fairly inferable that the delivery of the deed at the date of its execution to the bank was not absolute, but that its delivery was under an agreement that it should be withheld from record, and not recorded unless financial disaster was impending on the company or on the bankrupt; and that until a storm arose it should be held on condition. Such a delivery on condition of the deed in question was not a complete and absolute delivery, but a delivery in escrow. The history of the transaction shows that the condition on which the delivery was made arose when the company went into bankruptcy on August 13th, which fact became known to the bank on the 14th, and knowing that Webb must go under also, the bank hurriedly sent the deed to the Clerk's office to be recorded, and the condition being then fulfilled, the delivery of the deed became absolute and was no longer held by the bank in escrow or under conditions.

If this be true and sound in law, it follows that the delivery of the deed on August 14th was for an antecedent debt incurred on November 6, 1911; and that the maker at the time of the actual delivery was hopelessly and notoriously insolvent, and the bank knew this fact and knew that the effect of obtaining a security on August 14th, the date of the delivery, would be to give it a preference.

Under Sections 60, 67 and 70 and 47 of the Bankrupt Act, such a preference is voidable as to the trustee's title.

And as was held by Judge Lurton in the case of Rogers vs. Page, 15 A. B. R. 513:

"That the agreement to withhold a mortgage until a situation arose that required it to be filed was a delivery on a condition and that the mortgage held by way of escrow becoming effective as a specific lien only in the event that the affairs of the mortgagor reached the condition under which it was to be used as security. And its date of delivery was to be held as of that date."

"The mere fact that a mortgage has by negligence been omitted from registration does not void it between the parties. But there is a distinction between a more negligent failure to record a mortgage or deed and a deliberate agreement to do so.

although the mere fact of an agreement to withhold from the record is not of itself evidence of a fraudulent purpose as to constitute fraud in law. It is, however, a circumstance constituting more or less cogent evidence of a want of good faith, according to the particular situation of the parties and the intent as indicated by all of the facts and circumstances of the particular case."

Citing 14 Am. & Eng. Enc. Law, p. 526,
Story, Eq., Sec. 363; Bigelow on Fraud, p. 88 et seq;
Brown vs. Easton, 112 Fed. 592.

"That good faith, as well as a valuable consideration, is necessary to sustain a mortgage or conveyance against creditors, has been considered as essential ever since Twynes' case."

The only connection between this deed and the sixty-day note rested in a parol agreement, as neither written instrument refers to the other.

Each sixty-day note taken was discounted, and in fact was a new note, though evidencing the old debt. And if the effect of the lien was only after recordation, the debt it secured was, of course, an antecedent one, as the last discounted note was dated July 6th, at a time when both the bankrupt and the company were hopelessly insolvent, and of which fact the bank had knowledge.

IX.
POLICY.

In Dulaney vs. Morse, 29 A. B. R. 275, it is held:

"The Bankruptcy Act taken as a whole must be construed in view of the evil it was sought to remedy. The law would be a nullity if a person on the verge of bankruptcy could have outstanding secret unrecorded conveyances of which his general creditors had no notice, and by simply executing such conveyances more than four months prior to his going into bankruptcy escape the penalty imposed by the act of failure to record."

In In re Dismal Swamp Contracting Company, 14 A. B. R. 175, it is said:

"Once let it be understood that conveyances made within four months of bankruptcy can be successfully attacked, while those made in pursuance of a pre-existing bona fide agreement will be upheld, and the entire policy of the bankrupt law, in so far as it undertakes to specify the time within which preferences can and cannot be assailed, will be frustrated and destroyed. The door for fraud would be left wide open, and creditors would never know when they were safe in dealing with the estates of their debtors."

X.

NOT IN GOOD FAITH AND VOID AS TO CREDITORS.

The trustee contends that the evidence shows that the deed in question was withheld from record by the bank, under an agreement with the bankrupt, so as not to impair the credit of J. N. Webb, the bankrupt, and of the Webb & Crawford Co., and that during the period it was so withheld, that credit was extended to the bankrupt by several creditors in amounts that aggregated more than the value of the property, and that one of these creditors, namely: Jack F. Jackson, made an examination of the record for the express purpose of ascertaining whether there was recorded, any liens against this specific property, and finding none, extended credit expressly, on the ostensible, apparent and reputed ownership of the property by the bankrupt, free and unencumbered, (P. 21 of record), and that such an agreement to so withhold the deed in question was fraudulent and void under the common law as codified in Section 3224 of the Code of Georgia, 1910, and was void under Section 70, of the Bankrupt Act, as to said Jack F. Jackson, and was likewise void as to Jno. J. Wilkins, another creditor, who also extended credit to the bankrupt on the ostensible, apparent and reputed ownership by Webb of said property, free and unencumbered. (P. 24 of record).

The Trustee contends that the agreement and understanding between the parties, under which the said security deed was withhold from record made the conveyance void, under Section 3224 of the Code of Georgia, which Code Section is as follows:

CODE OF GEORGIA, 1910, SECTION 3224.

"ACTS VOID AS AGAINST CREDITORS."

"2. Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description, had or made with intention to delay or defraud creditors, and such intention known to the parties taking. A bona fide transaction on a valuable consideration, and without notice or ground for reasonable suspicion, shall be valid."

SUIT IN CITY COURT ENJOINED.

The real estate in question was in the physical possession of the bankrupt when the petition in bankruptcy was filed, and passed into the custody of the Court of Bankruptcy through the act of its Receiver, and subsequently its Trustee, on Aug. 13th, 1912. (Pp. 50 and 51, 49 and 39 of record).

Subsequent thereto, and on October 5th, 1912, National Bank of Athens served on J. N. Webb the statutory notice of its intention to sue, and claim ten per cent. Attorneys' fees, and thereafter filed its suit to the November Term, 1912, of the City Court of Athens, asking for a special lien on the land described in said security deed, and for 10% Attorneys' fees on said debt (pp. 5, 6 and 7 of record).

The evidence shows that the value of the property conveyed by the deed in question is of more value than the amount of the principal and interest of the debt at a fair market value, by several thousand dollars (p. 23 of record). It should therefore be administered as assets of the bankrupt estate by the Court of Bankruptcy, which has exclusive jurisdiction of the subject matter.

The suit in the City Court of Athens was instituted by the bank after the property passed into the exclusive jurisdiction of the Court of Bankruptcy, and, as frankly stated by the bank's counsel, was for the purpose of collecting 10% Attorneys' fees on the principal and interest, by giving the statutory notice, under the Georgia Statute.

It has been held by Hon. W. T. Newman, Judge of the District Court for the Northern District of Georgia, that the adjudication in bankruptcy, before a suit is brought on a note containing the 10% attorneys' fees clause, will prevent the collection of 10% attorneys' fees provided therein, as same was an inchoate right that the bankruptcy proceeding prevented from becoming complete and effectual.

In Re. Weiland, 28 Am. B. R. 620.

And the Trustee further contends that the real estate in question was in the actual and physical possession of the bankrupt when the petition in bankruptcy was filed, and that the Court of Bankruptcy obtained possession of the property, and jurisdiction to hear and determine the interests of those claiming liens thereon, and that this possession cannot be disturbed by the process of another court, and that the suit in the City Court should be perpetually enjoined.

Hebert vs. Crawford, 228 U. S. 204, 30 Am. B. R. 24.
Murphy vs. Jno. Hoffman Co., 211 U. S. 562,
21 Am. B. R. 487,
Whitney vs. Wenman, 198 U. S. 553, 14 Am. B. R. 45.

XI.

FACTS CONCURRED IN BY BOTH DISTRICT COURT AND CIRCUIT COURT OF APPEALS.

Trustee further contends that both of the courts below have concurred in the findings of fact that the deed in question was void as to creditors, because of the want of good faith in the transaction, and that there is sufficient evidence in the record to sustain the concurrent findings of fact by the two courts below, and that same should not be reversed.

Manson vs. Williams, 213 U. S. 453, 22 Am. B. R. 22,
Darlington vs. Turner, 202 U. S. 195-220.

XII.

MOTIONS TO DISMISS APPEAL IN COURT BELOW.

Trustee calls attention to motions filed in the court below to dismiss the appeal (pp. 61, 62, 63, 64, 65, 66, 67, 68 of record) and contends that said grounds, upon a consideration of the record of this appeal, should be considered favorably, and that said motions should be granted.

On the 1st, 2nd, 3rd, 4th and 5th grounds of the motion to dismiss (pp. 61, 62 and 63 of record) Trustee cites as authority the following cases, in favor of the motion:

Norcross vs. Nave & McCord Merc. Co., et al,
101 Fed. 796,
The Credit Co., vs. The Arkansas Central Rwy. Co.,
128 U. S. 258,
Fowler vs. Hamill, 139 U. S., 549,
Dufour vs. Lang, 54 Fed. 913,
Frame vs. Portland Gold Mine Co., 108 Fed. 750,
Webber, et al, vs. Mihills, et al, 124 Fed. 64.

And because the testimony was not reduced to narrative form, as required by Rule 75 — Rule of Practice in the Courts of Equity for the United States, effective Feb. 1st, 1913.

And for grounds of motion contained on pages 64, 65, 66, 67 and 68 of record, the Trustee relies upon the following authorities, to-wit:

Railroad Co. vs. Cutting, 68 Fed. 586,
Park v. Bowen, 86 Fed. 877,
Lodge v. Withers, 89 Fed. 160,
The Natchez, 78 Fed. 183,

La. A. & M. R. Co., v. Board of Levee, etc., 87 Fed. 594,
Grape Creek Coal Co. v. Far. Loan & Trust Co.,
63 Fed. 89,
R. R. Co. v. Mulligan, 67 Fed. 569,
Randolph v. Allen, 73 Fed. 23,
Railroad Co. v. Reeder, 76 Fed. 550,
Van Gunden v. Iron Co., 52 Fed. 838,
Pickham v. Manufacturing Co., 77 Fed. 663,
Hoge v. Magnes, 85 Fed. 355,
McFarlane v. Golling, 76 Fed. 23,
New York Dry Goods Co. v. Pabst Brew. Co.,
112 Fed. 38.

Respectfully submitted,

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The legal service of within brief acknowledged by receipt this April 29, 1905

Jas. J. Strickland

(Atty)

of Counsel for appellee

NATIONAL BANK OF ATHENS *v.* SHACKELFORD, TRUSTEE IN BANKRUPTCY FOR WEBB.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 40. Argued October 29, 1915.—Decided November 8, 1915.

A mortgage given for valuable consideration more than four months before the petition was filed, *held* fraudulent and void as to creditors because fraudulently withheld from record until the day the petition was filed.

In this case both courts below having concurred in finding as matter of fact that the mortgage was void because executed and withheld from record for the purpose of hindering and defrauding creditors, this court follows the rule that such finding will not be disturbed unless clearly shown to be erroneous.

208 Fed. Rep. 677, affirmed.

THE facts, which involve the validity of a mortgage lien on the property of the bankrupt, are stated in the opinion.

Mr. John J. Strickland, with whom *Mr. Roy M. Strickland* was on the brief, for appellant.

Mr. Lamar C. Rucker and *Mr. Horace M. Holden*, with whom *Mr. Stephen C. Upson*, *Mr. Howell C. Erwin* and *Mr. Andrew J. Cobb* were on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This controversy arose in a bankruptcy proceeding and was begun in the United States District Court for the Northern District of Georgia. Appellant claims that it holds a valid lien on certain real estate in the city of Athens, formerly the property of the bankrupt, Webb, under a mortgage deed executed by him November 6, 1911,

but not recorded until noon August 14, 1912, a few hours before the petition in involuntary bankruptcy was filed. Among other things, the trustee asserts that the mortgage is void as to creditors because fraudulently withheld from record. Bankruptcy Act, § 70, c. 541, 30 Stat. 544. Georgia Code, 1910, § 3224.

Having heard the witnesses and upon the entire evidence, the District Court, citing and purporting to follow *In re Duggan*, 183 Fed. Rep. 405 (1910), found and adjudged the deed invalid as against general creditors. Affirming this action the Circuit Court of Appeals for the Fifth Circuit declared: "The evidence in this case tends strongly to show that, although the mortgage given by the bankrupt to the appellant was for a valid consideration and effective as between the parties thereto, the same by understanding, if not agreement, was withheld from record, so as not to affect the mortgagor's credit; and we therefore concur with the trial judge in his disposition of the case." 208 Fed. Rep. 677, 678. In the *Duggan Case* the same court had held fraudulent and void, both as to prior and subsequent creditors, a chattel mortgage executed by a bankrupt but withheld from record under agreement so to do because of the effect which recordation would have on her credit.

Considering all said and adjudicated by the two courts below, we must conclude they concurred in finding, as matter of fact, that the mortgage in question was void as to creditors because executed and withheld from record for the purpose of hindering, delaying or defrauding them. The rule is well settled that a finding of this nature will not be disturbed upon review here unless clearly shown to be erroneous. *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78; *Stuart* v. *Hayden*, 169 U. S. 1, 14. An examination of the record reveals no clear error, and, accordingly, the judgment appealed from must be

Affirmed.